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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted] 203

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY, APPELLANTS,

vs.

THE CITY OF NEWPORT, KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JANUARY 18, 1921.

(28,044)

(28,044)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 687.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY, APPELLANTS,

vs.

THE CITY OF NEWPORT, KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 5, 1921.

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1 Proceedings had in the District Court of the United States for the Eastern District of Kentucky, at a regular term begun and held at Federal Court Hall, in the City of Covington, Ky., on Monday, October 18th, A. D. 1920, and of our Independence the 145 year.

Court met.

Present:

Hon. A. M. J. Cochran, Judge.

No. 3123.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, and The Suburban Electric Company, a Corporation under the Laws of Kentucky, Plaintiffs,

vs.

THE CITY OF NEWPORT, a Municipal Corporation under the Laws of Kentucky, Defendant.

2 *Bill in Equity.*

Filed Nov. 30, 1917.

United States District Court, Eastern District of Kentucky, at Covington.

#3123.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY, a Corporation under the Laws of Kentucky, and The Suburban Electric Company, a Corporation under the Laws of Kentucky, Plaintiffs,

vs.

THE CITY OF NEWPORT, a Municipal Corporation under the Laws of Kentucky, Defendant.

Plaintiffs are corporations organized under special charters of the Commonwealth of Kentucky. Defendant, the City of Newport, is a municipal corporation of the second class under the laws of Kentucky, and located in said Eastern District of Kentucky.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00), and arises under the Constitution of the United States in the manner hereinafter set forth.

Plaintiff, the South Covington & Cincinnati Street Railway Company, was organized and now exists under an act of the General

Assembly of the Commonwealth of Kentucky approved June 25, 1876, entitled "An Act to incorporate the South Covington & Cincinnati Street Railway Company;" by the said act of incorporation said company was created a body politic and corporate, with perpetual succession and power to construct, own, hold, operate and maintain a line or lines of street railway in said city of Newport and in the vicinity thereof along and over such streets and public ways in said
3 city as the City Council should grant the right of way to plaintiff, the South Covington & Cincinnati Street Railway Company; by the terms of said charter defendant, the City of Newport, was expressly authorized and empowered to grant to plaintiff, the South Covington & Cincinnati Street Railway Company, the right of way over all the streets and public ways of said city.

Defendant, the City of Newport, by ordinances duly passed October 3, 1867, and May 19, 1881, granted to the Newport Street Railway Company, a corporation under the laws of Kentucky, the perpetual privilege of constructing and operating street railways on, over and along the following streets in the City of Newport: Hubbard Street, Madison Street, York Street, Williamson Street, Washington Avenue, Eglantine Street, Saratoga Street and Taylor Street. Said ordinances were duly accepted by said Newport Street Railway Company, which constructed and operated said lines in accordance with the terms of said ordinances, and on February 11, 1882, conveyed said grants to plaintiff, the South Covington & Cincinnati Street Railway Company, which has since said conveyance been the owner and holder thereof and has maintained and operated street railway lines on the streets therein named.

The Newport & Dayton Street Railway Company was incorporated by an act of the General Assembly of the State of Kentucky approved January 25, 1868, with perpetual succession and power, with the consent of the City Council of Newport, to construct and
4 operate a street railway line on such streets in the City of Newport as might be agreed upon. Defendant, the City of Newport, by ordinance of April 14, 1887, granted to said Newport & Dayton Street Railway Company the perpetual right to construct and operate a street railway line from the corporate limits of the City of Newport on Main and Front Streets to the corner of York and Front Streets, with double or single track. Said ordinance was duly accepted by said Newport & Dayton Street Railway Company, which constructed and operated a street railway line in accordance with the terms thereof. By act of the General Assembly of the State of Kentucky approved April 26, 1886, amending the charter of said Newport & Dayton Street Railway Company, said company was given the perpetual right to run its line of street railway over the streets of the City of Newport by way of the Newport and Cincinnati Railroad Bridge to Fifth Street in the City of Cincinnati, Ohio. Under the terms of said act said Newport & Dayton Street Railway Company constructed and operated the street railway line on Front Street in the City of Newport, and when said approach to said bridge was extended to Third Street in the City of Newport, said company, with the consent of the city, removed its line from Front Street to Third

Street, and thereafter maintained and operated its line on Third Street under the authority of said act of the General Assembly. Said Newport & Dayton Street Railway Company, being duly authorized thereunto by the act incorporating it, conveyed to plaintiff,
5 the South Covington & Cincinnati Street Railway Company, its said rights and franchises in the City of Newport, and plaintiff has since said time owned and held said franchises and maintained and operated a street railway line on said routes.

Defendant, the City of Newport, by ordinance passed on or about July 18, 1906, granted to plaintiff, the South Covington & Cincinnati Street Railway Company, a franchise for the period of twenty years, to operate its street railway lines over and upon the following streets in the City of Newport, to-wit: Brighton Street from the entrance to the Newport and Covington Bridge to Fifth Street; Fifth Street from Brighton to Monmouth; Monmouth from Fifth to Third Street; Third Street from Monmouth to York; Third Street from Monmouth to Saratoga and the entrance to the Louisville & Nashville Bridge; York Street from Third to Fifth Street.

Plaintiff, the South Covington & Cincinnati Street Railway Company, is also the owner of a perpetual right of way to maintain and operate a street railway line on Beech Street, from Front to Third Street, in the City of Newport, by virtue of a deed from the owners of said street prior to the time of its dedication to the City of Newport.

Under and by virtue of said grants plaintiff has maintained and operated, and is now maintaining and operating street railway lines upon said streets and has invested large sums of money in the construction and maintenance thereof. Plaintiff, the South Cov-
6 ington & Cincinnati Street Railway Company, is now engaged in the through operation of cars from points in Cincinnati, Ohio, to points in Newport, Covington, Bellevue, Dayton and Ft. Thomas, Kentucky, whereby passengers are transported in intercity and interstate commerce between said points for one fare and without change of cars.

The Suburban Electric Company is a corporation under the laws of Kentucky formed by the consolidation on or about April 11, 1894, of The Covington Electric Company of Covington, Ky., The Suburban Electric Illuminating, Heating and Power Company of Newport, Ky., and The Citizens' Electric Light Company, of Dayton, Ky.

The Edison Electric Illuminating, Heating & Power Company, of Newport, Ky., was incorporated by an Act of the General Assembly of Kentucky on or about April 9, 1890, and by the terms of said act was authorized, subject to the same regulations and restrictions imposed by the city authorities of Newport upon other corporations in said city, to run its wires and conduits for electric power, light and heat in, under, on and over the streets, alleys and highways of said city and adjacent thereto. By an amendatory act of the General Assembly of Kentucky the word "Edison" wherever it appeared in said act last mentioned, was struck out and the word "Suburban" inserted.

On or about June 19, 1890, defendant, the City of Newport, passed an ordinance entitled "An Ordinance granting a right of way to the

Suburban Electric Illuminating, Heating & Power Co. to erect poles and wires upon the streets, lanes, alleys and other public
7 places in the City of Newport, Ky. for the purpose of supplying electric light, heat and power." By the terms of said ordinance and said Act of the General Assembly said Company was authorized and empowered in perpetuity to use all the streets, lanes, alleys and other public thoroughfares in the City of Newport for the purpose of erecting poles, laying conduits, maintaining and operating electric light wires, mains and apparatus for the distribution of electricity for light, heat and power, or either.

It was provided in said ordinance that said Company in placing said poles should erect them under the supervision of the city engineer or whomsoever the Board of Councilmen should appoint for the purpose.

Thereafter the said Company erected, constructed and maintained a plant for the production of electricity and a system of poles and wires for the distribution thereof in the City of Newport as provided in said ordinance.

Thereafter, namely on or about the 11th day of April, 1894, the said Suburban Electric Illuminating, Heating & Power Company of Newport, Ky., was consolidated with the other companies above mentioned into The Suburban Electric Company, plaintiff herein, which thereupon became the owner of the said plant for the production of electricity and the system of poles and wires for the distribution thereof. Said Suburban Electric Company has since said time owned and maintained and now owns and maintains said plant and system in said City of Newport.

8 Plaintiff, The South Covington and Cincinnati Street Railway Company, is the owner of a power house in said City of Newport wherein electric current is manufactured; that a portion of the machinery in said power house belongs to plaintiff, The Suburban Electric Company, and that by contract between said companies the electric current for the operation of the street railway system of the plaintiff, The South Covington & Cincinnati St. Ry. Co., and for the supply of the customers of the plaintiff, The Suburban Electric Co. is, and was at the times hereinafter mentioned, manufactured in said power house.

That owing to the increased demand for electric current for the uses of the plaintiffs and to the limited capacity of said power house, it was deemed advisable and necessary that said companies should arrange for the purchase of additional electric current from The Union Gas & Electric Company in the City of Cincinnati, Ohio, immediately across the Ohio River from said City of Newport, Ky. For the purpose of transmitting said electric current it was necessary that a wire should be constructed and maintained from said power house, located on Eleventh Street and the Licking River, to the Newport end of what is known as the Central Bridge in the City of Newport near Third and York Streets in said city.

That on or about the 3d day of February, 1915, plaintiffs erected poles and installed such a wire from the Newport end of said Central

Bridge to said power house over the following route in said
9 City of Newport, to-wit: From the Newport end of the Central Bridge along First Street to Central Avenue; thence south on Central Avenue to Third Street; thence west on Third Street to Patterson; south on Patterson to Fourth Street; west on Fourth Street to Brighton, thence along Brighton to an alley between Ninth and Lindsay Streets; thence along said alley to Lowell Street; thence along Lowell Street to a point opposite the power house; thence to said power house aforesaid. Said route is on the edge of said City of Newport in the less thickly populated part of said city and said wire was installed at a height from 30 to 50 feet above the ground, carried on porcelain insulators securely fastened and that there are no wires above it. Said poles were located and said wire installed under the supervision and direction and with the assent of the City Engineer or Commissioner of Public Works of the City of Newport.

Said power house above referred to is located near the Licking River where at times it is invaded by flood from said river and from the Ohio River interfering with the operation of the machinery in said power house generating electrical current with which to operate the street cars and furnish electric light and power to said city. The electricity obtained from said special wire above described is not interrupted by said flood conditions and it is a great advantage to said City of Newport and its inhabitants and to plaintiffs to have such additional or supplementary source of electric current which will not be disturbed by flood conditions. It is a further advantage
10 to said City of Newport and to its inhabitants and to said plaintiffs to have such independent and supplementary source of supply in the event of any accident at said power house interfering with the production of electricity therein.

Said wire was erected at an expense for said wire alone of more than $8,000 and including the machinery for the use thereof not less than $20,000.

Plaintiffs say that on November 20, 1917, the Board of Commissioners of the City of Newport adopted a resolution, a copy of which is hereto attached marked Exhibit A, reciting that said wire is dangerous to life and property and directing plaintiff, The South Covington & Cincinnati Street Railway Co. to remove the same not later than December 1, 1917, said resolution having been offered by Joseph G. Hermann, Commissioner of Public Works

Plaintiffs say that unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs injury which cannot be compensated in money and to their irreparable damage.

Plaintiffs say that it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article 1, Section 10 of the Con-
11 stitution of the United States and is a taking of plaintiffs'

property without due process of law in violation of the 14th Amendment to said Constitution of the United States.

Wherefore, plaintiffs pray that the court decree said resolution of November 20, 1917, as aforesaid to be null and void and that the City of Newport, its officers, agents and employees be enjoined by restraining order, preliminary injunction and final decree from enforcing, or taking any steps to enforce said resolution.

Plaintiffs further pray that they may have a writ of subpœna to defendant, commanding defendant to appear before this court and answer this bill of complaint, but not under oath, its answer under oath being hereby waived, and also a writ of injunction, enjoining and restraining the defendant, its officers and agents as hereinbefore prayed, and that plaintiffs may have such other and further relief as the nature of the case may require and as it would be entitled to in equity and in good conscience.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY,
THE SUBURBAN ELECTRIC COMPANY,
By MATT HEROLD,
ERNST, CASSATT & COTTLE,
Attorneys for Plaintiffs.

MATT HEROLD,
ERNST, CASSATT & COTTLE,
Solicitors for Plaintiffs.

STATE OF OHIO,
County of Hamilton, ss:

Polk Laffoon, being duly sworn, says that he is the Secretary of each of the plaintiffs and that the facts stated and allega-
12 tions made in the foregoing bill are true.

POLK LAFFOON.

Sworn to before me and subscribed in my presence this 28th day of November, 1917.

My notarial commission expires August 11, 1920.

[SEAL.] GEORGE STUGARD,
Notary Public in and for said County & State.

Exhibit A.

Filed Nov. 30, 1917.

Whereas the South Covington and Cincinnati Street Railway Compainy maintain a high tension wire extending from the Central Bridge at Front Street in the City of New Port, Kentucky, to the power house of said company at Eleventh and Brighton Street in Newport, and

Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and

Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens, be it

Resolved by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1st, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.

Adopted by the Board of Commissioners November 20th, 1917.

Attest:

ARTHUR ROTH,
Recorder.

13 *Spa. in Ch'y.*

Issued Nov. 30, 1917.

The President of the United States of America to the City of Newport, a Municipal Corporation Under the Laws of the State of Kentucky, Greeting:

You are hereby commanded to appear before our District Court of the United States of America, for the Eastern District of Kentucky, at the Federal Court Hall, in the City of Covington to answer a Bill in Equity exhibited against you in our said Court, by The South Covington & Cincinnati Street Railway Company and The Suburban Electric Company which you shall in nowise omit, under the penalty of the Law.

Witness the Honorable A. M. J. Cochran, Judge of the District Court of the United States of America, for the Eastern District of Kentucky, and the seal of our said District Court hereto affixed, at the Clerk's Office of said Court, at Covington this 30″ day of Nov. A. D. 1917 and in the 142 year of our Independence.

Attest:
[SEAL.]

J. W. MENZIES,
Clerk,
By M. VAN D. BELL,
His Deputy.

NOTE.—Answer or other defense is required to be filed in the Clerk's Office on or before the twentieth day after service, excluding the day thereof; otherwise, the bill may be taken pro confesso.

14 Spa. in Ch'y issued Nov. 30, 1917, returned and filed Dec. 7, 1917 with the following endorsement:

Received at Covington, Ky. Dec. 1, 1917. Executed by delivering a true copy to A. J. Livingston, Mayor of Newport, Ky. & to Joseph G. Herman, Commissioner of Public Works for Newport, Ky. Dec. 1, 1917.

R. C. FORD,
U. S. Marshal,
By T. S. ARTHUR,
D. M.

Motion for a Preliminary Injunction.

Filed Nov. 30, 1917.

Now come plaintiffs and move the court for a preliminary injunction in accordance with the prayer of the bill herein.

MATT HEROLD,
ERNST, CASSATT & COTTLE,
Attorneys for Plaintiffs.

Affidavit.

Filed Nov. 30, 1917.

Matt Herold, being duly sworn, says that he is one of the attorneys for the plaintiffs; that he has attempted to give notice of the application for a preliminary injunction to the City Solicitor of Newport but that he is absent from the City of Newport and that affiant has been unable to give such notice; that irreparable loss, damage and injury will result to plaintiffs before notice of the motion for a preliminary injunction can be served and a hearing had thereon.

MATT HEROLD.

Sworn to before me and subscribed in my presence this 30th day of November, 1917.

J. W. MENZIES,
Clerk
By D. M. MITCHEL,
D. C.

Temporary Restraining Order.

Entered & Filed November 30, 1917.

This cause coming on to be heard on the verified bill of the plaintiffs and on the motion for a preliminary injunction and upon the affidavit of Matt Herold, one of the attorneys for plaintiffs, and it appearing to the court that irreparable injury, loss and damage would result to plaintiffs before notice of said motion could be served and a hearing had thereon, as set forth in the bill and in said affidavit;

It is ordered that the defendant, its officers, agents and employees are restrained and enjoined, pending the further order of this court, from enforcing, or attempting to enforce, in any manner the resolution of the Board of Commissioners of the City of Newport of November 20, 1917, referred to in the bill, or from interfering in any manner, directly or indirectly, with the wire described in the bill and in said resolution.

Said motion for a preliminary injunction is set for hearing at Maysville, Ky. on the 7th day of December, 1917, at 2 o'clock P. M.

16 The amount of the injunction bond is fixed at $1,000 and now come the plaintiffs and offer their bond in said sum with American Surety Company of New York as surety, which said bond is hereby approved.

A. M. J. COCHRAN,
Judge.

Nov. 30, 1917.

Certified copy of Temporary Restraining Order entered & filed Nov. 30th, 1917, placed in the hands of the Marshal, and afterwards, towit, on Dec. 7, 1917, was returned & filed, endorsed as follows:

Received at Covington, Ky., Dec. 1, 1917. Executed by delivering a true copy to A. J. Livingston, Mayor of Newport, Ky. & to Joseph G. Herman, commissioner of Public Works for Newport, Ky.

R. C. FORD,
U. S. Marshal.
By T. S. ARTHUR,
D. M.

Consent Order.

Entered & Filed Dec. 7, 1917.

By agreement of the plaintiffs and the defendant, the hearing of the motion for a preliminary injunction is continued to December 18th, 1917, at Catlettsburg, Kentucky, and the restraining order issued herein on November 30th, 1917, is to remain in force pending the hearing of said motion.

A. M. J. COCHRAN,
Judge.

17 *Consent Order.*

Entered & Filed Dec. 17, 1917.

By agreement of the plaintiffs and the defendant the hearing of the motion for a preliminary injunction herein is continued to January 11th, 1918, at Covington, Ky. or if the court cannot hear said motion on said day, or either of the parties are unable to be present on said day, then the hearing shall be continued to the following week at Maysville, Ky., or to such time and place as may be convenient to the court and the restraining order issued herein on November 30th, 1917, is to remain in force and effect pending the hearing of said motion.

A. M. J. COCHRAN,
Judge.

Dec. 17, 1917.

Motion.

Filed Feb. 8, 1918.

Now comes the defendant, the City of Newport and moves for leave to file its answer herein.

BRENT SPENCE,
Counsel for Defendant.

Order.

Entered & Filed Feb. 8, 1918.

On motion of the defendant it is now ordered that the answer offered be and the same is now filed and noted of record.

A. M. J. COCHRAN,
Judge.

18 *Answer of Defendant.*

Filed Feb. 8, 1918.

The defendant, the City of Newport, reserving all manner of exceptions that may be had to the uncertainties and imperfections of the bill comes and answers thereto or so much thereof as it is advised is material to be answered and says, that it denies that the City of Newport by ordinance passed October 3, 1867 or May 19, 1891, granted to the Newport Street Railway Company, a corporation under the laws of Kentucky, the perpetual privilege of constructing or operating street railway lines on the following and along the following streets in the City of Newport: Hubbard Street, Madison Street, York Street, Williamston Street, Washington Avenue, Eglantine Street, Saratoga Street, or Taylor Street or that it granted to the Newport Street Railway Company perpetual privilege of operating on or along any of said streets or any part thereof; denies that any ordinances granting any perpetual privileges were duly accepted by the said Newport Street Railway Company, or that it constructed or operated said lines in accordance with the terms of said alleged ordinance; denies that on February 11, 1882 or at any other time it conveyed any perpetual privilege to the plaintiff, The South Covington & Cincinnati Street Railway Company, or that said company has since said conveyance been the owner or holder thereof, or has maintained or operated street railway lines on all the streets therein mentioned.

Defendant denies that the City of Newport by ordinance of April 14, 1887, granted to said Newport & Dayton Street Railway
19 Company the perpetual right to construct or operate a street railway line from the corporate limits of the City of Newport on Main or Front Streets to the Corner of York and Front Street with double or single track.

Defendant denies that the Newport & Dayton Street Railway Company constructed or operated a street railway line in accordance with the terms of any ordinance granting it any perpetual rights.

Defendant denies by an Act of the General Assembly of the State of Kentucky approved April 26, 1886, amending the Charter of said Newport & Dayton Street Railway Company, said company was given the perpetual right to run its line of street railway over the streets of the City of Newport, by way of the Newport & Cincinnati Railroad Bridge to Fifth Street in the City of Cincinnati, Ohio; denies that under the terms of said Act said Newport & Dayton Street Railway Company constructed or operated the street railway line on Front Street in the City of Newport, or when said approach to said bridge was extended to Third Street in the City of Newport, said Company with consent of the city, removed its lines from Front Street to Third Street or thereafter maintained or operated its lines on Third Street under authority of the said Act of the General Assembly.

Defendant denies under or by virtue of the grants set up in the bill herein plaintiff has maintained or operated, or is now maintaining or operating street railway lines set forth in the bill

20 Defendant says it has no knowledge or information as to whether or not The Newport & Dayton Street Railway Company conveyed all of its alleged rights or franchises in the City of Newport to The South Covington & Cincinnati Street Railway Company.

Defendant denies that the Edison Electric Illuminating Heating & Power Company was authorized by an Act of the General Assembly of Kentucky on or about April 9, 1890 or at any other time subject to the same regulations or restrictions imposed by the City of Newport upon other corporations in said City, or at all, to run its lines, wires or conduits for electric power, light or heat under or over or along said streets, alleys or highways in said City, or adjacent thereto, or that any of said alleged rights were acquired by the Suburban Electric Company by striking out from said Act the word "Edison" or inserting in lieu thereof the word "Suburban."

The defendant, the City of Newport, denies that by an ordinance dated June 19, 1890, or any other time, The Suburban Electric Illuminating, Heating & Power Company was granted a right of way to erect poles or wires upon the streets, lanes, alleys or other public places in the City of Newport for the purpose of supplying electric light, heat or power; denies that by said ordinance or said Act of the General Assembly of Kentucky The Suburban Electric Illuminating Heating & Power Company was authorized or empowered in perpetuity to use any of the streets, lanes, alleys or other public thoroughfares in the City of Newport for the purpose

21 of erecting poles, laying conduits, maintaining or operating electric light wires, mains or apparatus for the distribution of electricity for light, heat or power or any of them.

Defendant says it has no knowledge or information upon which to found a belief as to whether or not The Suburban Electric Illuminating, Heating & Power Company on or about the 11th day of

April, 1894, or at any other time, was consolidated with the other companies mentioned in the Bill herein into The Suburban Electric Company or that it thereupon became the owner of said plant for the production of said electricity, and the poles and wires for the distribution thereof, or whether said Suburban Electric Company has since said time owned or maintained or now owns or maintains said system in said City of Newport.

It says it has no knowledge or information upon which to found a belief as to whether or not the said Suburban Electric Company has since said time owned or maintained, or now owns or maintains said plant or system in said City of Newport.

Defendant says that it has no knowledge or information upon which to found a belief as to whether or not The South Covington & Cincinnati Street Railway Company is the owner of a power house in said City of Newport wherein electric current is manufactured, or whether a portion of said machinery in said power house belongs to plaintiff, The Suburban Electric Company, or whether or not by contract between said companies the electric current for the
22 operation of said street railway system of plaintiff, The South Covington & Cincinnati Street Railway Company, or for the supply of the customers of plaintiff, The Suburban Electric Company, is or was at all the times herein mentioned, manufactured in said power house.

Defendant says it has no knowledge or information upon which to found a belief whether or not owing to the increased demand for electric current for the uses of plaintiffs, or to the limited capacity of said power house, it was deemed advisable or necessary that said company should arrange for the purchase of additional electric current from the Union Gas & Electric Company in the City of Cincinnati, Ohio, immediately across the Ohio River from the City of Newport, or whether or not for the purpose of transmitting said electric current it was necessary that a wire should be constructed or maintained from said power house located on Eleventh Street and the Licking River to what is known as the Newport End of the Central Bridge in said City.

Defendant says that it is informed and believes that frequently no current is generated in said power house in the City of Newport, described in the bill, and that the current both for light and heat and for the purpose of propelling the cars of The South Covington & Cincinnati Street Railway Company is generated in the City of Cincinnati and conveyed to the City of Newport by the high tension wire complained of herein.

Defendant denies that said route described in the petition
23 over which plaintiff erected its said poles and installed its said wire, viz., from the Newport end of the Central Bridge along First Street to Central Avenue; thence south on Central Avenue to Third; thence west on Third to Patterson, south on Patterson to Fourth Street, west on Fourth Street to Brighton; thence along Brighton to an alley between Ninth and Lindsey Streets; thence along said alley to Lowell Street; thence along Lowell to a point opposite the power house; thence to said power house aforesaid, is on the edge of

the said City of Newport, or in the less thickly populated part of said City; denies that said poles were located or said wire installed under the supervision or direction or with the assent of the City Engineer, or Commissioner of Public Works of said City of Newport.

Defendant denies that said power house is at times invaded by floods of the Licking or from the Ohio River; interfering with the operation of said machinery in said power house with which to operate the street cars or furnish electric light and power to said City. Defendant admits that said power house has been invaded by the high waters of the Licking and Ohio Rivers but that said floods are exceedingly infrequent and have not occurred in many years.

Defendant denies that the electricity obtained from the said special wire described in the bill is a great advantage to the City of Newport or its inhabitants, or that it is an advantage to the City or its citizens to have such alleged additional or supplementary sup-
24 ply in the event of any accident at said power house interfering with the production of electricity therein.

Defendant says that there are other wires on the poles beneath said wire described in the bill, and that said wire carries an electric current of very high voltage and is dangerous to the lives of the citizens and inhabitants of the City of Newport and to the property located therein, and that plaintiffs erected said poles and said wire and maintain same without right or authority, and that plaintiffs or either of them never received any permission or authority from the City of Newport or the Board of Commissioners of the City of Newport to erect said poles or wire, and the City Engineer and the Superintendent of Public Works never pretended to grant any right or authority to plaintiffs, or either of them, to erect said poles or maintain said wire; nor did the City Engineer or the Superintendent of Public Works ever have any authority to grant said permission to erect said poles or wire described in the bill. There is nothing on record in the City of Newport indicating that the City of Newport or any official thereof, ever had any knowledge of the erection of said poles or the maintenance of said wire, or that the City Engineer or Superintendent of Public Works ever pretended to grant any permit to erect or maintain same.

Defendant says that said resolution of the Board of Commissioners of the City of Newport described and complained of in the
25 bill herein was passed in the exercise of the general Police Powers of the City of Newport, and that the removal of said wire was deemed by said Board of Commissioners to be necessary to secure the safety of the lives and property of the citizens and inhabitants of the City of Newport.

Defendant denies that by reason of anything alleged in the bill herein, plaintiffs have been injured or that said resolution is an impairment of any obligations of the alleged contracts set up in the bill herein, or any of them, or in violation of Article 1, Section Ten (10) of the Constitution of the United States; or is the taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of said Constitution of the United States; or is an im-

pairment of plaintiff's rights under the Constitution of the United States, or at all.

Having thus made full answer to all matters and things contained in the bill, this defendant prays to be hence dismissed with its costs.

BRENT SPENCE,
Counsel for Defendant.

Order for Taking Depositions.

Entered & Filed April 1st, 1918.

By agreement between parties it is ordered that the testimony in this case may be taken by depositions; plaintiff's depositions to be taken within 30 days from date hereof; defendant's depositions to be taken 30 days thereafter, and plaintiff's rebuttal within 15 days thereafter.

A. M. J. COCHRAN,
Judge.

26 *Order.*

Entered & Filed Oct. 28, 1918.

It is now ordered that this cause be and same is continued.

A. M. J. COCHRAN,
Judge.

Order.

Entered & Filed Dec. 6, 1918.

This day came the defendant and offered for filing an amended answer herein and on its motion, the court being advised, it is ordered that said amended answer be and the same is filed and noted of record.

A. M. J. COCHRAN,
Judge.

Amended Answer.

Filed Dec. 6, 1918.

The defendant, the City of Newport, reserving all manner of exceptions that may be had to the imperfections of the bill, comes now and amends its answer herein by leave of Court and says:

That the enforcement of said resolution complained of in the bill herein, and the removal of the said poles and high tension wire described in the bill, will not be attempted to be made by defendant, or any officer, or agent, or servant of said defendant, but will only be

sought by and through an order of the Campbell Circuit
27 Court, a court of competent jurisdiction, first had and obtained and after hearing, and of due and reasonable notice to all interested parties.

Defendant further answering says that this suit does not really and substantially involve a controversy properly within the jurisdiction of this Court, for that this suit is wholly based upon the alleged existence of a Federal question and that the allegations in said suit are dependent on the construction of the laws of the United States and the Constitution of the United States, and the allegation that any of the alleged facts set up in the petition constitute an impairment of the obligations of any of the alleged contracts of plaintiff in violation of Article I, Section 10 of the Constitution of the United States, or is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment to said Constitution of the United States, are not truly and in good faith made, but on the contrary the averments in the bill as aforesaid are stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court. Wherefore, defendant says that the allegations are fictitious and fraudulent and that it is apparent upon the face of the bill herein that this Court has no jurisdiction of the subject matter of the action and that no federal question is involved.

Wherefore defendant prays as in its answer herein.

THE CITY OF NEWPORT,
By BRENT SPENCE,
Solicitor for the City of Newport.

STATE OF KENTUCKY,
County of Campbell, set:

A. J. Livingston, being first duly sworn, says that he is the
28 Mayor of the City of Newport, defendant herein, and that he has knowledge of the facts alleged in the foregoing answer and that the allegations in said answer are true.

A. J. LIVINGSTON.

Subscribed and sworn to before me this 5 day of December, 1918.
[SEAL.]
LOUIS REUSCHER,
Notary Public, Campbell Co., Ky.

My Commission expires Jan. 18, 1920.

Motion.

Filed Dec. 14, 1918.

Now comes defendant, the City of Newport, and moves that this cause be set for trial at the term commencing January 13th, 1919.

BRENT SPENCE,
Solicitor for Defendant.

Order.

Entered & Filed Dec. 14, 1918.

On motion of the defendant it is now ordered that this case be and same is set for hearing at the special term of the court at Covington, on Friday, January 17th, 1919.

A. M. J. COCHRAN,
Judge.

December 14th, 1918.

29 ***Order.***

Entered & filed Jan. 17, 1919.

By agreement of parties, the court being advised, it is now ordered by the court that this cause be and same is continued and set for special hearing on Wednesday, January 29th, 1919.

A. M. J. COCHRAN,
Judge.

Order.

Entered & filed April 9th, 1919.

This day came the parties and by agreement, it is now ordered that this cause be submitted; and further that the parties herein be and they are allowed time in which to file briefs herein.

A. M. J. COCHRAN.

Order.

Entered & filed Oct. 30, 1919.

It is now ordered that this cause be and same is continued.

A. M. J. COCHRAN,
Judge.

Order.

Entered & filed April 5, 1920.

It is now ordered that time be given parties, plaintiff and defendant to brief and that sixty days thereafter be given for reply brief herein.

A. M. J. COCHRAN,
Judge.

30 *Opinion.*

Filed Oct. 16, 1920.

This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article 1 of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the City towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of Des Moines v. Des Moines City Ry. Co. 214 U. S. 179.

The cause is, therefore, dismissed for want of jurisdiction.

A. M. J. COCHRAN,
Judge.

Oct. 16, 1920.

Decree.

Entered & Filed October 18, 1920.

Came defendant and filed a motion that this cause be dismissed because this Court has no jurisdiction of the subject matter to which plaintiffs object, and the cause being submitted for final judgment upon arguments and briefs of counsel and the Court being
31 sufficiently advised it is adjudged and decreed that this Court is without jurisdiction and said motion to dismiss be and the same is hereby sustained and said cause is dismissed, and plaintiffs will pay the costs of this action, to which ruling of the Court the plaintiffs except.

A. M. J. COCHRAN,
Judge.

Order.

Entered & Filed Oct. 22, 1920.

Upon the Court's own motion, the entry of dismissal herein is set aside, on the ground that it was entered through error.

A. M. J. COCHRAN,
Judge.

October 22, 1920.

Decree.

Entered & Filed Nov. 4, 1920.

This cause came on to be heard upon the pleadings and the evidence and arguments of counsel, whereupon the court finds that the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same.

Wherefore it is ordered, adjudged and decreed that for the reason that this court is without jurisdiction of the cause the same is hereby dismissed at plaintiffs' costs; to which plaintiffs except
32 and give notice of appeal to the Supreme Court of the United States.

A. M. J. COCHRAN,
Judge.

Nov. 4, 1920.

Assignment of Errors.

Filed Nov. 4th, 1920.

Now come the plaintiffs and respectfully submit that in the proceedings and in the final judgment of the District Court of the Eastern District of Kentucky in the above entitled cause there is manifest error in this, to-wit:

1. The court erred in holding that it is without jurisdiction of the matters and things set out in the original bill.

2. The court erred in holding that the resolution of the defendant referred to in said bill does not impair the obligation of plaintiffs' contracts set forth in said bill.

3. The court erred in holding that the said resolution of defendant does not contemplate any action on behalf of the City outside of the institution of legal proceedings.

4. The court erred in dismissing the cause on the ground that it is without jurisdiction thereof.

MATT HEROLD,
ERNST, CASSATT & COTTLE,
Attorneys for Plaintiffs.

33 *Bond on Appeal or Error.*

Filed Nov. 5, 1920.

Know all men by these presents:

That we, The South Covington & Cincinnati Street Railway Co. and The Suburban Electric Company as principals and The Ameri-

can Surety Company of New York as surety, are held and firmly bound unto The City of Newport, Kentucky, in the full and just sum of One Thousand Dollars, to be paid to the said The City of Newport *his* certain attorneys, legal representatives or assigns, to which payment well and truly to be made, we bind ourselves our heirs, executors and administrators, jointly and severally by these presents:

Sealed with our seals and dated this 5th day of November in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at the October term of the District Court of the United States for the Eastern District of Kentucky, in a suit depending in said court, between The South Covington & Cincinnati Street Railway and The Suburban Electric Co., plaintiffs and The City of Newport, defendant, judgment was rendered against the said plaintiffs and the said plaintiffs having obtained an appeal to the Supreme Court at the time of the entry of the decree and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit.

Now the condition of this obligation is such that if the said South Covington and Cincinnati Street Railway and The Suburban Electric Company shall prosecute its appeal to effect and answer all damages and cost if it fail to make its plea good, then the above
34 obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

THE SOUTH COVINGTON & CINTI. ST. RY. CO.
THE SUBURBAN ELECTRIC CO.
MATT HEROLD,
ERNST, CASSATT & COTTLE,
Attys.
AMERICAN SURETY COMPANY OF NEW YORK,
By U. J. HOWARD,
Res. V. Pres.,
By ED. E. WALKER,
Res. Ass't Sec.

Approved by
A. M. J. COCHRAN
Judge of the U. S. District Court,
Eastern District of Kentucky. [SEAL.]

Certificate.

Filed Nov. 5, 1920.

I hereby certify that the judgment of dismissal herein is based solely on the ground that the matters and things set out in the pleadings herein do not present a controversy arising under the Constitution or laws of the United States and that this court is without jurisdiction of the same.

A. M. J. COCHRAN,
Judge.

Nov. 5, 1920.

Order Allowing Appeal.

Entered & Filed Nov. 5, 1920.

The plaintiffs herein having given notice of appeal in open court at the time of the entry of the decree herein, and having filed
35 their assignment of errors herein, it is ordered that an appeal to the Supreme Court of the United States from the decree herein be and the same is hereby allowed.

It is further ordered that the restraining order and temporary injunction heretofore entered herein be continued in force during the pendency of said appeal.

The amount of the bond is fixed at $1,000 and the bond presented by plaintiffs in said amount with American Surety Company of New York as surety is hereby approved.

A. M. J. COCHRAN,
Judge.

Nov. 5, 1920.

Præcipe for Record on Appeal.

Filed Nov. 15, 1920.

To the clerk:

Please make up the record for appeal herein, including all pleadings, filings, and orders, but excluding all depositions, briefs, and subpœnas.

MATT HEROLD,
ERNST, CASSATT & COTTLE.
Solicitors for Plaintiffs.

Acknowledgment of Service.

Newport, Kentucky, November, 1920.

Service of the foregoing præcipe is acknowledged and the undersigned consents and agrees that the foregoing constitutes a sufficient and proper record.

BRENT SPENCE,
Solicitor for Defendant.

36 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

I, J. W. Menzies, Clerk of the United States District Court, for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing 35 pages contain a true and correct copy of the record, as per præcipe, and stipulation filed herein in the matter set

out in the caption hereto, as the same appears from the records and files of this office.

Witness my hand as clerk and the seal of said Court, at Covington, Ky., this 20 day of December, A. D. 1920, and of the Independence of the United States of America the 145 year.

[Seal of U. S. District Court East. Dist. of Ky., U. S. of America.]

J. W. MENZIES,
Clerk.

Endorsed on cover: File No. 28,044. E. Kentucky D. C. U. S. Term No. 687. The South Covington & Cincinnati Street Railway Company and The Suburban Electric Company, appellants, vs. The City of Newport, Kentucky. Filed January 18th, 1921. File No. 28,044.

Office Supreme Court, U. S.
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WM. R. STANSBURY
CLERK

No. 203

OCTOBER TERM, 1921

Supreme Court of the United States

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,

Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,

Appellee.

Brief for Appellants

RICHARD P. ERNST,
ALFRED C. CASSATT,
FRANK W. COTTLE,
MATT HEROLD,
Attorneys for Appellants.

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Attorneys for Appellants.

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Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,

Appellee.

Brief for Appellants

This is an appeal from a judgment of the United States District Court for the Eastern District of Kentucky dismissing, for want of jurisdiction, an action in which appellants sought to enjoin appellee from removing a high-tension electric wire erected and maintained by appellants along certain streets in Newport, Kentucky.

The companies claimed the contract right under their franchises to maintain the wire; the City Board of Com-

missioners (the legislative body of the city) adopted a resolution directing its removal within ten days; the companies brought their suit alleging their contracts and that the action of the city was an impairment of their contracts in violation of Article I, Section 10 of the Constitution of the United States and a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment; and that unless restrained by injunction the city would forcibly remove and destroy the wire to the plaintiffs' irreparable damage.

The court took the view that the resolution in question, a copy of which was attached to the bill as an exhibit (R. 6), did not "contemplate any action on behalf of the city toward removing it outside of the institution of legal proceedings having that end in view," that it was not, therefore, an impairment of plaintiffs' contracts, and dismissed the case on the authority of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179. (R. 17.)

We respectfully submit that the resolution here involved is wholly unlike the resolution in the Des Moines case; that it directly impairs a contract, and fairly implies summary action; that the bill alleges that the city intended forcible removal and destruction of the wire, and that the court erred in dismissing the case for want of jurisdiction.

THE FACTS

The decree (R. 18) and the certificate (R. 19) based the judgment of dismissal on the ground that

> "the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same."

The following statement of facts is from the pleadings; the bill (R. 1), the answer (R. 10) and the amended answer (R. 14).

The South Covington & Cincinnati Street Railway Co. is a corporation organized under a special act of the General Assembly of Kentucky, with power to construct and operate a line or lines of street railway in the city of Newport. The city of Newport, by various ordinances referred to in the bill, granted to the predecessors of the South Covington & Cincinnati St. Ry. Co. and to that company, franchises under which, at the time of the filing of the bill, it was maintaining and operating street railway lines on the streets of the city of Newport. (R. 1-3.)

The Suburban Electric Company is a corporation under the laws of Kentucky, formed by the consolidation of several electric companies and having a franchise, granted June 19, 1890 (R. 3-4), to erect poles and wires on the streets and other public places in the city of Newport, Kentucky, for the purpose of supplying electric light, heat and power. The franchise grants the right to use all the streets, alleys and other public thoroughfares in the city of Newport, provided, that the company in placing its poles must erect them under the supervision of the City Engineer or whomsoever the Board of Councilmen may appoint for the purpose. The company erected its plant and has, for many years, maintained a system of poles and wires for the distribution of electricity in the city of Newport. (R. 4.)

The Street Railway Company is the owner of a power house in the city of Newport, wherein electric current is manufactured; a portion of the machinery in said power house belongs to the Electric Company and by contract between the two companies electric current for the operation of the street railway system and for the supply of

the customers of the Lighting Company has been for many years manufactured in said power house. (R. 4.)

It was deemed advisable and necessary that the parties should arrange for the purchase of additional current from the Union Gas & Electric Company in the city of Cincinnati, Ohio, because of the increased demand for electric current for the uses of the plaintiffs, the limited capacity of said power house and the fact that the power house is located near the Licking River, where at times it is invaded by flood from said river and from the Ohio River, interfering with the operation of the machinery in the power house. (R. 4-5.)

On or about the 3rd day of February, 1915, plaintiffs erected poles and wires and installed a wire from the Newport end of the Central Bridge (between Newport and Cincinnati), to the said power house over the route described in the bill; said route is on the edge of the city of Newport in the least thickly populated part of the city, and said wire was installed at a height thirty to fifty feet above the ground, carried on porcelain insulators securely fastened. Said poles were located and said wire installed under the supervision and direction and with the assent of the City Engineer, or Commissioner of Public Works of the city of Newport. Said wire was so installed as to avoid interference by flood conditions and is a great benefit to the city of Newport and its inhabitants and to plaintiffs in furnishing an additional or supplementary source of electric current in the event of floods, or in the event of any accident at the power house interfering with the production of electricity. The wire was erected at an expense, including the machinery for the use thereof, of not less than $28,000. (R. 5.)

On November 20, 1917, nearly three years after the wire was erected, the Board of Commissioners of New-

port adopted a resolution, a copy of which is as follows (R. 6):

> "Whereas the South Covington and Cincinnati Street Railway Company maintain a high-tension wire extending from the Central Bridge at Front Street in the City of Newport, Kentucky, to the power house of said company at Eleventh and Brighton Street in Newport, and
>
> "Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and
>
> "Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens, be it
>
> "Resolved by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.
>
> "Adopted by the Board of Commissioners November 20, 1917."

Plaintiffs alleged in their bill

> "that it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10 of the Constitution of the United States, and is a taking of plaintiffs' property without due process of law in violation of the 14th Amendment to said Constitution of the United States."

Plaintiffs further alleged that

> "unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs' injury which can not be compensated in money and to their irreparable damage."

The bill was filed on November 30, 1917, and a temporary restraining order issued.

On February 8, 1918, defendant filed an answer denying most of the allegations of the bill and alleging that the wire in question carried an electric current of very high voltage dangerous to life and property in the city of Newport.

The answer, however, does not deny the allegation of the bill above quoted, that "unless restrained by this court defendant will forcibly remove and destroy said wire," etc.

The pleadings stood in this shape until December 6, 1918, and in the meantime the testimony was taken and the case prepared for trial.

On December 6, 1918, the city filed an amended answer containing the following allegation:

> "That the enforcement of said resolution complained of in the bill herein, and the removal of the said poles and high-tension wire described in the bill, will not be attempted to be made by defendant, or any officer, or agent, or servant of said defendant, but will only be sought by and through an order of the Campbell Circuit Court, a court of competent jurisdiction, first had and obtained and after hearing, and of due and reasonable notice to all interested parties."

ARGUMENT

The opinion of the District Court is very brief and is as follows (R. 17):

> "This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high-tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the city towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179.
>
> "The cause is, therefore, dismissed for want of jurisdiction."

We respectfully submit that the court erred.

The wire in question had been erected under the authority of the ordinance of Newport of June 19, 1890, and with the approval of the City Engineer, as required by the terms of that ordinance. It had been maintained for nearly three years. The resolution of the commissioners recited that it was a danger to life and property and ordered its removal within ten days. In other words, the city undertook to terminate by force of said resolution a contract right theretofore acquired and enjoyed by the plaintiffs.

It was this resolution itself which purported to terminate and therefore impaired plaintiffs' contract rights.

The resolution did not question the legal right to maintain the wire, but ordered its removal as an exercise of the police power, on the claim that it was dangerous to life and property. The resolution did not direct the City Solicitor to present the question to a court for its adjudication; it undertook to adjudicate the question by the force of its own terms and arbitrarily directed the removal of the wire.

The allegations of the bill that plaintiffs had a contract right to maintain the wire; that it was not dangerous to life or property, show that the resolution was not a proper exercise of the police power and was itself an impairment of the contract.

These allegations present a case arising under the Constitution of the United States and properly invoke the jurisdiction of the District Court, even without the allegation of the bill that the city intended to forcibly remove and destroy the wire. But the allegation of such intention on the part of the city certainly precludes the contention, on the question of jurisdiction, that the resolution merely called for a law suit to determine whether or not a contract existed, and was not an impairment of the contract.

As the decision of the District Court seems to be based wholly on the doctrine of the Des Moines case, we first call the court's attention to what was involved in that case.

In the Des Moines case the resolution involved was as follows (214 U. S. 183):

> "Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and

over the streets and bridges and public places of the City of Des Moines; and

"Whereas: It is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible.

"Be it Resolved by the City Council of the City of Des Moines: That said companies be and they are hereby ordered to remove all of their tracks, poles and wires from the streets, bridges and public places of the City of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

"Be it Further Resolved: That should the said Railway Companies fail to commence such removal within the time above specified, the City Solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be it Further Resolved: That the City Clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

We call particular attention to the two features of the resolution upon which the court's decision was based.

1. The resolution recites as the occasion for its adoption that questions had been raised as to the rights of the Street Railway Companies to maintain their tracks along the streets of the city and that it is essential that those questions be determined as speedily as possible.

2. After ordering the removal of the tracks it directed the City Solicitor to take action to enforce the city's position.

This court said (184):

> "Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the City Solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the City Solicitor to take action to enforce the city's position. The only action to be expected from a City Solicitor is a suit in court. We can not take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right."

In the case at bar the resolution was of an entirely different character than that involved in the Des Moines case, especially in the particulars above referred to.

1. The resolution recites—not the existence of legal questions requiring settlement, presumably in court—but the existence of a danger which, if it existed, required prompt abatement.

It might be assumed, therefore, that the city officials would have met that alleged danger in the most summary manner.

2. There is no direction to the City Solicitor to take action and therefore no presumption that legal proceedings were all that was contemplated by the Commissioners. There was an arbitrary direction to the Street Railway Company to remove the wire within ten days.

The court could not assume that the city would not attempt to enforce the resolution except by proceedings in court. The resolution outlawed the wire after December 1, 1917, and assuming it to be valid, as the city officials doubtless did, they would have been authorized to remove the wire forcibly.

In *Iron Mountain Railroad Co.* v. *City of Memphis*, 96 Fed. 113, the city passed an ordinance requiring the railroad company to adopt certain rates by a specified date, and declaring that on failure of compliance the complainant's street rights should be deemed to be forfeited "and the city will then retake and resume its possession and control of said premises and rights and privileges in said contract granted, as if said contract had never been made."

The railroad company filed its bill in the United States Circuit Court to enjoin the enforcement of the ordinance. The city filed an answer denying, among other things, any threat "to forcibly dispossess the complainant of any of its property, or vested rights."

The lower court granted an injunction against any forcible action by the police or other officers of the city to oust the complainant company from its property rights, leaving it open to the city, however, to enforce the ordinance by action in court. Thereafter the city brought an action in the state court to enforce the ordinance and the United States Circuit Court refused to permit the railroad company to file an amended bill enjoining the prosecution of said action in the state court.

Both sides took an appeal to the Circuit Court of Appeals. The city appealed upon the claim that the court should not have granted any injunction at all. This appeal was denied. The company appealed on the ground that the lower court should have enjoined any action by the city under the ordinance, and this appeal was sustained.

The Circuit Court of Appeals, composed of Judges Taft, Lurton and Clark, said in its opinion by Judge Taft (p. 125):

> "We come now, however, to a much more difficult question, which arises on the appeal of the complainant below, the railroad company. The court below held that there was no jurisdiction under the bill, except that which arose out of the threatened taking possession of the street, and ousting the railroad company therefrom by force, without due process of law. It enjoined the city only from taking forcible possession of the street. This injunction might properly have been founded on the relative situations of the parties as they were admitted to be. The fact that the railroad company was in possession of the street, gained lawfully, and that the city could not rightly enforce a forfeiture without judicial proceedings, was a sufficient ground for granting the injunction which the court below granted; and it became immaterial, therefore, in furnishing this remedy, whether the railroad company had violated a condition forfeiting its estate. If the threatened use of the police to enforce the resolution of forfeiture was essential to the federal jurisdiction, then it would seem that the order of the court below disposed of the entire controversy before it. If, however, the resolution of the legislative council was a law of the state regulating interstate commerce, or was a law of the state impairing the obligation of contracts, or depriving a person of its property without due process of law, then the complainant could invoke the jurisdiction of the court below to enjoin its enforcement, *without regard to the method by which it was proposed to carry it into effect.*" [Italics ours.]

Also on page 130:

> "It impairs the obligation of a contract if it purports by force of law to authorize anyone to do that

which would be a breach of the contract. This the resolution certainly does, assuming the condition not to have been broken, for by declaring the revestiture of title and right of possession in the city, it authorized the city officers peaceably to take possession of the street, and to take up the tracks, and would doubtless authorize the bringing of suits by abutting owners for a nuisance peculiarly harmful to them."

Also on page 131:

"In the case at bar we have a law which, if that which is recited to be a fact by its terms is not a fact, purports to give state authority to commit acts which would be breaches of a contract. It purports to restore the street to the city, so that private citizens would be authorized thereby to treat the same as city property, and city officers would be authorized to take peaceable possession, peaceably to take up the tracks, and to remove other property of the grantee therefrom. It seems to us that this is a law impairing the obligation of a contract if founded on a non-existent breach of a condition."

So in this case we have a resolution "which, if that which is recited to be a fact by its terms is not a fact" (namely that the wire in question is a danger to life and property), "purports to give state authority to commit acts which would be breaches of a contract" * * * "and city officers would be authorized to take peaceable possession, peaceably to" remove the wire, etc.

In *Columbus Railway & Power Co.* v. *Columbus*, 249 U. S. 399, the court had under consideration an action brought by the Railway Company to enjoin the city of Columbus from enforcing ordinances which the company had theretofore accepted, but whose obligations it sought to escape because the fare prescribed in said ordinances

had become, under the changed conditions produced by the war, so inadequate as to be confiscatory.

There was no allegation or suggestion that the city of Columbus would undertake to enforce the ordinances except by appropriate litigation. The trial court said (253 F. 509): "The nature of the threats made and the means to which it is expected the city will resort to enforce its threats, are not stated or shown." The trial court held that it had no jurisdiction, saying (253 F. 509):

> "And even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court."

The court dismissed the bill "both for want of jurisdiction and because no valid cause of action in equity is stated."

This court held that the District Court had jurisdiction saying (249 U. S. 406):

> "We are of opinion that there was jurisdiction in the District Court to entertain the bill as it presented questions arising under the Fourteenth Amendment to the Federal Constitution not so wholly lacking in merit as to afford no basis of jurisdiction. Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

In *Eubank* v. *Richmond*, 226 U. S. 137, the court held that the municipal ordinance requiring the authorities to establish building lines on separate blocks back of the public streets and across private property, on the request

of less than all of the owners of the property affected, was in violation of the Fourteenth Amendment. The court in reaching its conclusion said:

> "We are testing the ordinance *by its extreme possibilities* to show how in its tendencies and instances it enables the convenience or purpose of one set of property owners to control the property rights of others," etc. [Italics ours.]

We cite this case merely as the basis for the argument that if, in determining the validity of municipal legislation, a court will test the same "by its extreme possibilities" the court may also determine by the same test its jurisdiction to enjoin the enforcement of such legislation.

We must not, however, overlook the direct allegation of the bill that unless restrained by injunction, the city would forcibly remove and destroy the wire, thereby interfering with the operation of the business of the companies and causing them irreparable damage.

While this allegation bore directly on the jurisdiction of the court, as a court of equity, it also contradicted and destroyed any implication that the resolution in question called for nothing but a law suit to test disputed rights.

The original answer of the city not only failed to deny the allegation of the bill that the city would forcibly remove and destroy the wire, but alleged affirmatively that its removal was "necessary to secure the safety of the lives and property of the citizens and inhabitants of the city of Newport." (R. 13.)

In *Vicksburg Water Works Company* v. *Vicksburg*, 185 U. S. 65, the Water Works Company had an exclusive franchise in Vicksburg. The Legislature of Mississippi authorized the city to issue bonds to purchase or construct a water works system. In pursuance to that act an elec-

tion was held and it was voted to issue bonds to buy or construct water works for the city and later the city council passed the following resolution:

> "Resolved, that the mayor be and is hereby instructed to notify the Vicksburg Water Works Company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; *that the city attorney take such action as shall be necessary to determine the rights of the city in the premises.*" [Italics ours.]

The city also filed a suit in the state court to cancel and annul the contract, which suit was removed to the federal court and was pending on motion to remand.

Thereupon the company filed its bill in the federal court to restrain the city from assuming to abrogate and take away the franchises and contract rights of the complainant, and from attempting to coerce the company to sell its works to the defendant for an inadequate price, and to declare the act of the Legislature of Mississippi and the resolution and ordinance of council to be an impairment of the obligations of plaintiffs' contract, etc.

Objection was made to the jurisdiction of the court, as a federal court and as a court of equity, and the Circuit Judge dismissed the bill. On appeal to this court the judgment of dismissal was reversed. The court said on pages 81-82:

> "Whether this act of the Legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine

at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a federal question.

* * * * * *

"It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city can not be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We can not accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without war-

> rant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

The same case came before the court later on its merits in 202 U. S. 453, and the court again laid down the principle

> "it is a valuable feature of equity jurisdiction to anticipate and prevent threatened injury."

In the case at bar the resolution undertakes to terminate, because of its alleged dangerous character, the right of the companies to maintain the wire in question. The resolution does not expressly, or by implication, limit the city officials to litigation as the method of enforcement. On the contrary, the declaration in the resolution of an existing peril suggests the probability of summary action.

If the declaration of the existing peril is not true—and the bill alleges it is not true—then such resolution is an impairment of the contract rights claimed in the bill.

We submit that the jurisdiction and duty of the Federal Court in all such cases is clear. The case of *Des Moines* v. *Des Moines Railway Co.* is an exception to the general rule, based upon the very obvious indications in the resolution there involved, that the resolution was adopted solely for the purpose of settling disputed legal questions in the only way which they could be settled, namely, by a notice to vacate and a proceeding in court.

The allegation in the amended answer (R. 14)

> "that the enforcement of said resolution complained of in the bill herein and the removal of said poles and

> high-tension wire described in the bill will not be attempted to be made by defendant or any officer, or agent, or servant of said defendant but will only be sought by and through an order of the Campbell Circuit Court, a court of competent jurisdiction, first had and obtained and after hearing and of due and reasonable notice to all interested parties."

does not help the appellee on the question of jurisdiction.

We submit that where the city adopts a resolution which has the effect of impairing plaintiffs' contracts and whose enforcement is not limited by its own terms to action in court, and where the bill charges the defendant with the intent to forcibly remove the wire and such allegation is not denied in the answer of the defendant, the City Solicitor can not come in after the testimony is taken and defeat the jurisdiction of the court with an amended answer containing the allegation that it is not the intention of the city at that time to enforce the resolution except by a suit in court.

Neither the City Solicitor, who signed the amended answer, nor the Mayor, who verified it, had power or authority to so bind the city as to the method of enforcement of the resolution in question as to prevent the Police Department, for instance, from removing and destroying the wire by force.

The Statute of Kentucky, § 3235c-12, is as follows:

> "The Mayor and the four Commissioners shall constitute a Board of Commissioners. In this Board of Commissioners shall be vested all the legislative, executive and administrative power of the city, save as herein otherwise provided."

By Section 18 of the same Act, the Mayor is Commissioner of the Department of Public Affairs and some other

Commissioner must be designated as head of the Police Department under the title Superintendent of the Department of Public Safety.

The City Solicitor is not an officer of the city at all, but a mere employee. Section 19.

There is no allegation in the amended answer that the Board of Commissioners, having all the legislative, executive and administrative power of the city, took any action authorizing the statement set forth in the amended answer, or limiting in any way the method of enforcing the resolution here involved.

All other considerations aside, the failure of the city in its original answer to deny the allegation of the bill amounted to an admission that it was then the purpose of the city officials to "forcibly remove and destroy said wire." The effect of this allegation and admission in strengthening the jurisdiction of the court was not destroyed by the amended answer filed ten months later and purporting to state the present purpose of the city officials. There was no denial even in the amended answer that it was the original intention of the city to "forcibly remove and destroy said wire."

When the allegations of the bill show jurisdiction that jurisdiction can not be destroyed by the mere allegations of the answer, especially a belated amended answer.

As this court said in *Columbus Ry. & Power Co.* v. *Columbus, supra:*

> "Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

We respectfully submit that the judgment of the court below should be reversed.

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Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 203.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY AND SUBURBAN ELECTRIC COMPANY, APPELLANTS,

vs.

CITY OF NEWPORT, KENTUCKY.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Attorneys for Appellants.

(28,044)

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SUPPLEMENTAL BRIEF FOR APPELLANTS.

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1. On the power of the Federal court to enjoin proceedings in a State court, we call attention to

Home Tel. & Tel. Co. *v.* Los Angeles, 227 U. S., 278, on page 293:

"Finally the subject was elaborately considered in *Ex parte* Young, 209 U. S., 123. Without attempting to fully state the case it suffices to say that although the proceeding was one in *habeas corpus*, the controversy in its ultimate aspect concerned the power of a Federal court to prevent the enforcement of railroad rates fixed under State legislative authority which

were confiscatory. In the course of an opinion reviewing the whole field it was said (p. 155):

"'The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, *either of a civil or criminal nature*, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.'" (Italics ours.)

Ex parte Young, 209 U. S., 123, on pages 142-143:

"The question of jurisdiction, whether of the circuit court or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the circuit court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty, to decide. Under these circumstances, the language of Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat., 264, 404, is most apposite. In that case he said:

"'It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be

treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty.'"

Also 161-162:

"It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the State law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, *in both civil and criminal cases*, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout v. Starr*, 188 U. S., 537, 544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a State court. *Taylor v. Taintor*, 16 Wall., 366, 370; *Harkrader v. Wadley*, 172 U. S., 148.

"Where one commences a criminal proceeding who is already party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. *Davis, &c., Co. v. Los Angeles*, 189 U. S., 207. In *Dobbins v. Los Angeles*, 195 U. S., 223-241, it is remarked by Mr. Justice Day, in delivering the opinion of the court, that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance

> may be reached and controlled by a court of equity.' *Smyth v. Ames* (*supra*) distinctly enjoined the proceedings by indictment to compel obedience to the rate act." (Italics ours.)

2. When we filed our reply brief, in which we cited Mitchell *v.* Dakota Central Telephone Co., 246 U. S., 396, we had not had opportunity to examine the record and briefs in that case. We have now examined them, and are confirmed in our claim that that case is decisive of the case at bar on the question of jurisdiction.

The municipal action complained of in that case was a *reesolution*—not an ordinance.

The resolution declared the rights of the telephone company had expired; ordered the company to remove its poles, wires, etc., and notified the company that if it failed to comply, then the "City Council will take such steps as may be neecessary to secure the immediate removal," etc.

There was therefore no threat of anything except further leegislative action.

The city made the same contentions as are made by the ciity in this case; among others, that no forcible action was thhreatened. It cited the same authorities as are relied on byy the city in this case. But this court held that the district court had jurisdiction.

3. The city could not require the removal of the wires, if att all, except by municipal action finding and declaring them to be a public danger (Passaic *v.* Pub. Service Com., 75 N. J. Eq., 379). The resolution complained of, therefore, umdertakes by its own force to terminate the contract right, amd if its findings and declarations are unjustified by the

facts, as alleged in the bill, the resolution itself is an impairment of a contract and a taking of property in violation of the Federal Constitution, irrespective of the method of its enforcement.

4. Nothing in the answer can defeat the jurisdiction authorized by the allegations of the bill. In St. Paul, M. & U. Ry. *v.* St. Paul N. P. Ry., 68 F., 2, the Circuit Court of Appeals for the Eighth Circuit said, page 10:

> "If jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any Federal question or questions."

Respectfully submitted,

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No. 203.

Supreme Court of the United States

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,
Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Appellee.

Brief for Appellee.

BRENT SPENCE,
Attorney for Appellee.

THE COURT INDEX PRESS, 646-650 Main st., Cincinnati, Ohio, March, 1922.

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Supreme Court of the United States

(October Term 1921)

No. 203.

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,
Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,
Appellee.

Brief for Appellee.

STATEMENT OF CASE.

This action was instituted by appellants against the appellee to declare null and void, and to enjoin the enforcement by appellee of a resolution adopted by the Board of Commissioners of the City of Newport, Kentucky, on November 20th, 1917, which is as follows:

> "Whereas the South Covington and Cincinnati Street Railway Company maintain a high-tension wire extending from the the Central Bridge at Front Street in the City of Newport, Kentucky, to the power

house of said Company at Eleventh and Brighton Street in Newport, and

"Whereas the said wire contains an electrical current of very high voltage and is dangerous to life and property, and

"Whereas the removal of said wire is necessary to secure the safety of the lives and property of the citizens be it,

"Resolved, by the Board of Commissioners of the City of Newport, Kentucky, that the South Covington and Cincinnati Street Railway Company be directed to remove said wire not later than December 1, 1917, and that a copy of this resolution be sent to the South Covington and Cincinnati Street Railway Company.

"Adopted by the Board of Commissioners November 20, 1917."

The high tension wire, the subject of the resolution, and of this suit extends from the entrance of the Central Bridge in the City of Newport to the power-house of appellant companies through the entire length of the City. The wire which conveys a current of 12,000 volts of electricity is carried upon wooden poles by means of insulators fastened to wooden horizontals or cross arms, and is used for the purpose of conveying, from the power house of The Union Gas and Electric Company in Cincinnati, electricity to the power house of appellant companies in Newport, for the purpose of furnishing light, heat and power to the city of Newport and its citizens and inhabitants, and also for the purpose of furnishing electricity for the propelling of cars of appellant the South Covington and Cincinnati Street Railway Company in the City of Newport.

Appellants aver that they have acquired the authority and right to erect these poles and string the high-tension wire by reason of the fact that they are the owners of certain grants and franchises from the State of Kentucky and the City of Newport, which they set up in their petition.

Appellee filed its answer on February 8th, 1918. On December 6th, 1918, it filed an amended answer in which it alleged:

> "That the enforcement of said resolution complained of in the bill herein and the removal of the said poles and high tension wire described in the bill will not be attempted to be made by defendant or any officer, or agent, or servant of said defendant, but will only be sought through an order of the Campbell Circuit Court, a Court of competent jurisdiction, first had and obtained and after hearing and of due and reasonable notice to all interested parties."

Upon final hearing the Court dismissed the cause for want of jurisdiction and the cause is here, upon direct appeal, from the District Court.

ARGUMENT.

The opinion of the District Court is so very brief that we copy it herein, in full. It is as follows:

> "This cause is before me on final hearing. I do not think that I have jurisdiction of the cause. No diversity of citizenship exists between the parties. The sole ground of jurisdiction is that it involves a federal

question. There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution. But it does not impair the obligation of such contract as plaintiff has with defendant. It simply directs the plaintiff, Street Railway Company, to remove the high-tension wire complained of. It is based upon a denial of its right to maintain it. But the resolution does not contemplate any action on behalf of the city towards removing it outside of the institution of legal proceedings having that end in view. It is inconceivable that an attempt to remove it would be made in any other way. The case comes within the decision in the case of *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S., 179.

"The cause is, therefore, dismissed for want of jurisdiction."

It is obvious from a mere cursory reading of the resolution complained of that it does not direct any officer of the city to remove the wire nor does it provide any manner for its removal. It is merely a request to the South Covington and Cincinnati Street Railway Company, one of the appellants, to remove the wire not later than December 1st, 1917. And no request is made to, and the resolution does not apply to the appellant The Suburban Electric Company.

There is nothing in the record showing that appellee will remove or attempt to remove the wire, or take any action in this respect other than the mere adoption of the resolution. Appellants must rest the question of jurisdiction upon its adoption. The city has done nothing more than merely adopt the

resolution; no penalties are prescribed for failure to comply therewith, and it required no affirmative action by any officer or agent of the city.

It is inconceivable that this resolution could operate to impair any of appellants alleged contracts or take their property without due process of law.

So far as the present resolution is concerned, the enforcement of it is left entirely to the South Covington and Cincinnati Street Railway Company, and if it refuses to do as the city directs, the purpose of this particular resolution will have ended. It is directed to but one corporation, and commands it to do a definite thing. Its purpose was frustrated and its powers exhausted when that company refused. Any further action that may be taken in the future by the city would certainly be entirely independent of the adoption of this resolution and could not be considered in connection with it.

The appellants do not allege under what authority the City of Newport has adopted the resolution, and for the resolution to be a State Law within the meaning of the Constitution, it has been held that it must be a valid resolution, adopted by the municipality under a proper grant of power. It may be seriously doubted whether a resolution could have the effect, of repealing an ordinance or of nullifying any rights granted under an ordinance. The purpose of a resolution could be effectuated by motion, the subject matter of which would not properly constitute an ordinance. We do not urge this contention for the judgment of the lower Court which we think was sound, was not based upon it.

There is a much stronger reason why the judgment of the lower Court should be sustained.

In this case there is no diversity of citizenship. All the parties are corporations under the laws of the State of Kentucky, and the only manner in which the Court could have obtained jurisdiction is by the violation by appellee of some constitutional right of appellants.

It has been the constant policy of the Federal Courts to prevent this discrimination from being evaded.

In *Bernards Township* v. *Stebbins*, 109 U. S., 341-350, the Court said:

> "But in the matter of the jurisdiction of the Federal Courts, the discrimination between suits between citizens of the same State and suits between citizens of different States is established by the Constitution of the United States. And it has been the constant effort of Congress and of this court to prevent this discrimination from being evaded by bringing into the Federal Courts controversies between citizens of the same State."

That the resolution itself did not invade any of the Constitutional rights of appellants seems clear, not only from the very obvious reason that it was entirely ineffectual to do anything, and was merely a request without penalties prescribed upon failure to comply, but the question here involved has been settled beyond any ground of controversy by many adjudicated cases.

In the case of *American Telephone & Telegraph Company, of Alabama* v. *Town of New Decatur*, 176 Federal, 133, the facts are similar to the facts in the case at bar. This was a suit in equity the purpose

of which was to enjoin the Town of New Decatur from interfering with plaintiff's telephone system, consisting of lines of poles and wires as constructed in that town, and from instituting legal proceedings in the State Courts to enjoin the plaintiff from operating and maintaining and managing its telephone system in the town of New Decatur. The bill avers certain grants to plaintiff of franchises to occupy with poles and wires the highways of the town, subject to certain supervision and regulations. It also avers the adoption of an ordinance by the town providing, (1) for the removal from the highways of plaintiff's poles and wires by plaintiff, (2) in the event of plaintiff's failure to effect such removal in thirty days for the removal thereof by the town officers; and (3) declaring the maintainance of said poles and wires thereafter by plaintiff a nuisance for which plaintiff's employees and officers were made responsible. All of which it was alleged was in violation of Article 1, of Section 10 of the Constitution and of the due process clause of the Fourteenth Amendment thereto.

The opinion of the Court in the above case so thoroughly collates all the authorities and so ably discusses the question involved herein that we shall quote from it at length.

The Court says at page 137:

> "There is a stronger reason why the conduct of the defendant, as set out in the bill, does not constitute legislation impairing the obligation of contract rights. The rule is well settled that an ordinance or resolution of municipality, the effect of which is merely to deny liability upon or repudi-

ate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding. In the case of *St. Paul, Gas Light Co. v. St. Paul*, 181 U. S., 142, 149, the court expressed the principle in this language:

" 'The other provision (of the ordinance) in question created no right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in future to pay the interest on the cost of the construction of the lamp posts, which were ordered to be removed; that is to say, it was but a denial by the city of its obligation to pay, and notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company to enforce what it conceived to be its rights under the contract. When the substantial scope of this provsion of the ordinance is clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance, reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts

only to the contention that every case involving a controversy covering a municipal contract is one of federal cognizance determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

In the case of *Mercantile Trust Co.* v. *Columbus*, 203 U. S., 311, 321, the court said:

"The ordinance and act were not mere statements of an intention on the part of one of the parties to a contract not to be bound by its obligations. Such a denial on the part, even of a municipal corporation, contained in an ordinance to that effect, is not legislation impairing the obligation of a contract. *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142.

"And after quoting from the case there cited, the portion incorporated in this opinion, the court said further:

" 'In the case at bar the conditions are entirely different. There was not merely a denial by the city of its obligation under the contract, but the question is whether there were not new and substantial duties in positive opposition to those contained in the contract created, and their performance provided for by the ordinance and act. The act of the legislature aided the city by granting it power to itself to erect waterworks and to issue bonds in payment thereof and the city was proceeding to avail itself of the power thus granted, when its progress was arrested by the filing of the bill in this case, and the issuing of a temporary injunction. It would seem as if the case were really within the principle decided in *Walla Walla* v. *Walla Walla Water*

Co., 172 U. S., 1; *Vicksburg Water Co.* v. *Vicksburg*, 185 U. S., 65; again reported *Vicksburg* v. *Water Co.*, 202 U. S., 453; *Davis* v. *Los Angeles*, 189 U. S., 207; *Knoxville Water Co.* v. *Knoxville*, 200 U. S., 22.

"The case of *Dawson* v. *Columbia Trust Co.*, 197 U. S., 178, 181, clearly differentiates the class of cases in which the ordinance merely denies liability and repudiates the contract obligation, from the other class in which the ordinance creates rights or duties antagonistic to the contract rights charged to have been impaired. In that case the court said:

" 'The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of the contract or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142-150. Undoubtedly the decisions on the two sides of the lines are very near to each other.

But the case at bar is governed by the one which we have cited and not by *Walla Walla Walla Walla Water Co.*, 172 U. S., 1, which is cited and distinguished in *St. Paul Gas Light Co.* v. *St. Paul.* In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S., 60, the city had made a contract with the waterworks company, and afterwards a law was passed authorizing the city to build new works. The city acting under this law denied liability and took steps to build the works whereupon the waterworks company filed its bill, alleging the law to be unconstitutional. This bill was held to present a case under the Constitution. In the case before us, there was no legislation sub-

sequent to the contract, and it is not even shown that there was a color of previous legislation for the city's acts. These acts are alleged to be unlawful and the allegation would be maintained by showing that they were not warranted by the laws of the State. See *Hamilton Gas Co.* v. *Hamilton City*, 146 U. S., 258-266; *Lehigh Water Co.* v. *Easton*, 121 U. S., 388-392. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contract or otherwise give rise to a suit under the Constitution of the United States.

"On one side of the line of cases are *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S., 1, *Vicksburg* v. *Vicksburg Waterworks Co.*, 185 U. S., 60, *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517, *Mercantile Trust Co.* v. *Columbus*, 203 U. S., 311, and *Northern Pacific R. R. Co.* v. *Duluth*, 208 U. S., 583. In each of these cases the municipal legislation amounted to more than a naked breach or repudiation of contract, in that it created powers and rights in antagonism to the contract rights, such as the power to construct competing water or gas works, when an exclusive right was given by the contract or ordinance, or an authority to issue bonds or call an election to that end, or the authority to compel a railroad company to construct or maintain at its expense a viaduct over a highway. On the other side of the line are the cases of *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S., 142, *Dawson* v. *Columbia Trust Co.*, 187 U. S., 178, and *Des Moines* v. *City Ry. Co.*, 214 U. S., 179, in each of

which the ordinances were construed to amount to no more than a breach or repudiation of a municipal contract, and, for that reason, not to constitute legislation impairing the obligation of contract within the meaning of the Constitution. Upon the proper classification of the case at bar in this respect depends its correct decision. In the case at bar no antagonistic rights or powers to those of the original contract or ordinance were created by the subsequent ordinances and resolutions, and the case resembles in that respect the line of cases last cited. There was (1) a mere repealing ordinance; (2) an ordinance directing the plaintiff to remove its poles and wires from the streets within 30 days, and in the event of its failure to do so a direction to the town authorities to remove them and a declaration that their continued maintenance thereafter would constitute a nuisance; and (3) subsequent resolutions directing the city attorney to file proceedings in the state court to compel the removal of the plaintiff's poles and wires from the streets, to compel it to cease doing business after the expiration of its existing license, and forbidding its reissue to plaintiff. So far as the ordinances and resolutions concern the right of plaintiff to do business, other than its right to maintain poles and wires on the highways, no federal question is involved, for there is no showing in the bill of any vested right to a license to do business in any other sense in the town limits. Eliminating the license feature, the case at bar is identical in legal effect with that of *Des Moines* v. *City Ry. Co.*, 214 U. S., 179, and is controlled by it. The opin-

ion of the court is brief, and is set out in full as follows:

" 'This is a bill brought in the Circuit Court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and if carried out will take the property of the corporation without due process of law, contrary to the fourteenth amendment. The Circuit Court granted an injunction against the enforcement of the resolution, and the defendant appealed to this court. The plaintiff, the appellee, sets up, under a certain ordinance, a right unlimited as to time to construct, maintain and operate an electric street railway in and over the streets, alleys and bridges of Des Moines.

" 'The resolution alleged to impair these rights is as follows: "Whereas questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the City of Des Moines ; and whereas, it is essential to the preservation of the rights of the City of Des Moines that such questions be determined as speedily as possible: Be it resolved by the city council of the City of Des Moines that said companies be and they are hereby ordered to remove all of their tracks poles and wires from the streets, bridges and public places of the city of Des Moines, and to restore and repair the surface and pavement where paved of all of the streets

along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution; be it further resolved, that should the said railway companies fail to commence such removal within the time above specified, the city solicitor be and he is hereby instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution; be it further resolved, that the city clerk be and he is hereby instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith.' "

" 'We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the Circuit Court cannot be maintained. Leaving on one side all questions as to what can be done by resolution as distinguished from ordinance under Iowa laws, we read this resolution as simply a denial of the appellee's claim and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was sim-

ply to put them in a position of disobedience, as a ground for a suit, if the city was right.' "

"In the case at bar, it is true that the ordinance of May 3, 1904, directs the town marshal to remove the poles, if the plaintiff failed to do so in the stipulated time. This might differeniate the case from the case cited, except for the fact that on May 11th thereafter the city council adopted a later resolution, directing the city attorneys to institute and prosecute in the name of the defendant such a suit or proceeding as might be deemed proper by them to compel the plaintiff to remove its poles and wires from the streets and to prevent their use in its telephone business. This resolution, passed subsequently, clearly indicates the abondonment by the defendant of any intention on its part to remove the poles and wires by violence, and an intention to compel their removal by legal proceedings only. The passage of a resolution authorizing the institution of a suit to compel removal is inconsistent with a purpose to proceed under an earlier resolution to remove by force and without suit. The bill also avers "that, in pursuance of the ordinances and resolutions passed by the board of aldermen of the city of New Decatur, as hereinabove set forth, the said city authorties of the said city intend forthwith and without delay to take steps to force orator to remove its poles and wires from the public streets of said city." The averment is that the removal was to be forced pursuant to the ordinances and resolutions set out in the bill: that is, by filing legal proceedings to compel their removal. No

> acts or threats of defendant are averred or relied on other than the ordinances and resolution set out in the bill, as indicating a purpose on its part to resort to violence. Construing the resolutions and ordinances as an entirety, the only action reasonably to be expected to be taken by the town authorities was a suit in court. This case is, therefore, identical with the case of *Des Moines City Railway Co., supra*: and controlled by it. For the reasons stated, the court is without jurisdiction.'"

In *Southern Bell Telephone & Telegraph Co.* v. *City of Birmingham, Ala.*, et al 211 Fed. 709, which followed the reasoning of and in which is cited the same authorities as cited in the case of *American Tel. & Tel. Co.* v. *Town of New Decatur* (*supra*), a bill was filed by plaintiff to restrain the enforcement of an ordinance of the City of Birmingham and to have it declared null and void and a cloud on plaintiff's title to its franchise to collect tolls from its subscribers. The Ordinance assailed in effect repealed a previous ordinance which purported to make effective an agreement between the telephone company and the City for service to be charged to the inhabitants of the city for five years in the future. Under it the Company was to have the right to increase its rates for certain character of service from January 1, 1914.

The repealing ordinance cited the making of the agreement, the passage of the ordinance, that the contract was *ultra vires* of the powers of the city commission, that it had been breached by the company's alleged failure to give the character of ser-

vice stipulated to be given by it to its subscribers; and declared the contract and ordinance rescinded and annulled as being both *ultra vires* and as having been breached by the telephone company. The contention of the telephone company is that the repealing ordinance impairs the obligation of the original contract and the ordinance ratifying it, and is for this reason obnoxious both to the State and Federal Constitution.

The court held in this case, as it held also in the case of *American Tel. & Tel. Co.* v. *Town of New Decatur* (*supra*), that in order to sustain the contention that the subsequent ordinance is invalid for the reason asserted by the telephone company it must establish (1) the existence of the contract; (2) the obligation imposed on the city and its inhabitants by it; (3) the impairment of such obligation by State legislation. It held that the ordinance complained of was not legislation impairing any of the constitutional rights of the telephone company.

The Court in distinguishing this case from the line and character of cases cited by appellant herein in their brief said, page 712:

> "The plaintiff relies upon the cases of *Iron Mountain R. R. Co.* v. *Memphis*, 98 Fed., 113, 37 C. C. A. 410, *Detroit* v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, and *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517. In each of these cases there was something more in the ordinance than a mere declaration of repudiation of the contract. The ordinance, in each case, had an affirmative provision, susceptible of enforcement, in addition to the declaration of invalidity.
>
> "In the case of *Iron Mountain R. R. Co.*

v. *Memphis*, the ordinance declared the forfeiture of a franchise to occupy a street with railroad tracks, and, as the court held, authorized a re-entry by the city upon the premises in possession of the railroad. Its effect, if enforced, was to dispossess the railroad of property in its possession, and it was to prevent this enforcement and the consequent dispossession of the railroad, that it was held entitled to relief. In the case at bar the ordinance authorizes no interference or disturbance of the plaintiff or its property or franchise, but merely attempts to declare invalid a contract.

"In the case of *Detroit* v. *Detroit Citizens Ry. Co.*, 184 U. S., 368, at page 380, the city by an ordinance had reduced the fare of the street railroad company, and had prescribed a specific maximum fare as the lawful fare. Having fixed a specific fare as the only lawful fare, the railroad company was forced to accept the reduced fare, or eject the passenger, and likely create in so doing a breach of the peace. The answer of the city admitted that 'they intend to enforce obedience by the company to such ordinances.' Even then, the court stressed the fact that the answer of defendants did not question the jurisdiction of a court of equity, as partly justifying its retention of jurisdiction over the cause.

"In the case of *Cleveland* v. *Cleveland City Ry. Co.*, 194 U. S., 517, at page 531, there was also a specific maximum fare of four cents fixed by the ordinance as the only lawful fare, as was true in the Detroit case. The court relies upon the peculiar fact, present in the case, that the enforcement of the ordinance would have estab-

lished two rates of fare on the same line: 'leading to consequences dangerous to the public interest, peace and tranquility, the extent of which it would be difficult in advance to perceive.' And this, we think, brings the case directly within the principle by which jurisdiction in equity was maintained in *Detroit* v. *Detroit Citizens' Ry. Co.*, 184 U. S., 368.

"It is clear that jurisdiction was only sustained because by reason of the peculiar relations of a passenger carrier to its patrons and the fact that the ordinance fixed a specific rate of fare, the ordinances would either necessarily have to be observed by the carrier, or breaches of the peace continually provoked in the resistance of them, to the detriment of the parties and the public. In each of those cases, as in this case, the ordinance provided no penalty for its breach, but there were other means of enforcement, from the nature of the carrier's business, that do not exist in this case."

And also, on page 714:

"Again, in this case the danger of breaches of the peace, as a result of the plaintiff's resistance to the ordinance, is removed because of the differing character of plaintiff's business from that of a carier of passengers. If the plaintiff's patrons refuse to pay the rate fixed by it, it has but to discontinue their service. Its rates are collected in advance. By refusing to furnish service, it subjects itself only to the liability to be sued that any person does who breaches a contract, in good faith, but under a mis-

taken view of his rights. Equity does not relieve against such a situation. Discontinuance of service does not imply the necessity of ejection by force, as does the refusal to accept a reduced fare from a passenger who is already on the carrier's vehicle. The reasons which induced the Supreme Court to distinguish the cases, relied upon by plaintiff, from the general legal principle stated are absent from this case. It presents only a case of a declared repudiation of a contract by an ordinance, one which, it is well settled, does not constitute impairing action by the state."

And further along, on the same page, the court said:

"The harm, if any, to be caused by it, was completely accomplished upon its enactment. Its enactment could not have been properly enjoined in advance, since, being legislative action, it was not subject to the control of the courts. Its enforcement by the city can not be enjoined, since by its terms it is not to be so enforced and no steps are prescribed to be taken by any one in the way of its enforcement."

And on page 715, the Court said:

"An inspection of the ordinance of December 12, 1913, shows that no action of the city or its officers could be taken 'pursuant to or under the authority' of it, since it prescribed none to be taken. It is declarative only of a forfeiture of the contract, without providing at all as to how the forfeiture is to be enforced. The only action taken, or to be taken with relation to the

ordinance, upon the part of the city, was its enactment. That could not have been enjoined in the first instance. Its repeal can not now be ordered by the court. As the ordinance contains no provisions looking to its enforcement by the city or its officers, it is clear that there is no room for injunctive relief with relation to the ordinance against the city or its agents or the commissioners, as such."

Appellants complain in their brief that the jurisdictional question was not raised in the original answer of appellant, and that the question of jurisdiction was set up by "amended answer filed ten months later puporting to state the present purpose of the city."

Section 37 of the judicial code provides that "if in any suit commenced in a district court * * * it shall appear to the satisfaction of said district court, at any time, such suit has been brought * * * that such suit does not really and substantially involve a suit or controversy properly within the jurisdiction of said district court * * * * * * the said district court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just."

The objection that jurisdiction to entertain the suit did not exist is one that may be taken by answer. *Anderson* v. *Watt*, 138 U. S., 694.

Indeed, it has been frequently decided, under Section 37 it is the duty of the court when it shall appear to its satisfaction that the suit does not really and substantially involve a suit or controvesy properly within its jurisdiction, to dismiss the same,

and this the court may do whether the parties raise the question or not.

In *Defiance Water Co.* v. *Defiance*, 191 U. S., 184, the court said:

> "The fundamental question of jurisdiction first, of this court and then of the court from which the record comes, presents itself on every writ of error or appeal and must be answered by the court whether propounded by counsel or not. *Mansfield Coldwater & C. Railway Co.*, v. *Swan*, 111 U. S., 379-382; *Metcalf* v. *Watertown*, 128 U. S., 586; *Morris* v. *Gilmer*, 129 U. S. 315; *Continental National Bank* v. *Byford*, 191 U. S., 119."

It is true appellants alleged that unless restrained by the court appellee will forcibly remove and destroy the wire, but appellants can not strengthen their case by imputing motives or purposes to appellee that can not reasonably be read into the resolution.

It is obvious the District Court would have dismissed this cause for lack of jurisdiction, if the amended answer had not been filed for its judgment was not based upon the amended answer, but upon the resolution complained of.

The District Court in effect said the resolution needed no interpretation, as the intention expressed by it was clear.

The pertinent part of the opinion is as follows:

> "But the resolution does not contemplate any action by the city towards removing it (the high tension wire) outside of

the institution of legal proceedings having that end in view.

"It is inconceivable that an attempt to remove it would be made in any other way."

Appellant's cause of action is measured by the resolution. Upon it is based the question of jurisdiction. And upon it they must prevail or fail.

We respectfully submit that the judgment of the Court below should be affirmed.

BRENT SPENCE,
Attorney for Appellee.

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No. 203

OCTOBER TERM, 1921

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Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,

Appellee.

Reply Brief for Appellants

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The only matter involved is the jurisdiction of the District Court as a Federal Court.

The court found in its decree (R. 18)

> "that the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same."

The court certified (R. 19)

> "that the judgment of dismissal herein is based solely on the ground that the matters and things set out in the pleadings herein do not present a controversy arising under the Constitution or laws of the United States and that this court is without jurisdiction of the same."

The only question before the court, therefore, is whether the District Court had jurisdiction to hear and decide the case. Judicial Code, § 238.

Counsel for appellee says on page 4 of this brief:

> "There is nothing in the record showing that the appellee will remove or attempt to remove the wire, or take any action in this respect other than the mere adoption of the resolution. Appellants must rest the question of jurisdiction upon its adoption."

Counsel is in error in this statement. While the resolution standing alone would support jurisdiction, it does not stand alone. The jurisdiction depends on the allegations of the bill (*Columbus Ry. & Power Co. v. Columbus*, 249 U. S. 399, 406). The bill alleges not only the adoption of the resolution, but the purpose of the city to take forceable action thereunder. (R. 5)

> "that unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs' injury which can not be compensated in money and to their irreparable damage."

The purpose of the city in this respect was so well understood that the answer of the city filed on February 8, 1918, more than two months after the bill was filed, did not deny the above quoted allegation of the bill as to the purpose of the city. That allegation stood admitted for ten months longer, until December 6, 1918, when the amended answer set up for the first time the then purpose (December 6, 1918) of the city to seek the enforcement of the ordinance only by proceedings in court.

However, as the jurisdiction of the court rests on the allegations of the bill, the city's answer, whether prompt or belated, can not oust that jurisdiction.

Counsel suggests on page 5 of his brief, but does "not urge" that the resolution here involved could not "have the effect of repealing an ordinance or of nullifying any rights granted under an ordinance"; that in order to be a state law, within the meaning of the Constitution, "it must be a valid resolution, adopted by the municipality under a proper grant of power."

There are obvious reasons why counsel can not urge this contention.

The bill alleges that the resolution was adopted by the Board of Commissioners of the city. It is clear from the Statutes of Kentucky (§ 3235 e-12; see our main brief, p. 17) that the Board of Commissioners has all the legislative power of the city. The bill alleges that the resolution is an impairment of plaintiffs' rights "in violation of Article I, Section 10 of the Constitution of the United States, and is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment," etc.

There is no distinction, material in this case, between an ordinance and a resolution. (*Robertson* v. *Southern Bitulithic Co.*, 190 Ky. 314.)

The answer of the city alleges (R. 13):

> "Defendant says that said resolution of the Board of Commissioners of the City of Newport described and complained of in the bill herein was passed in the exercise of the general Police Powers of the City of Newport, and that the removal of said wire was deemed by said Board of Commissioners to be necessary to secure the safety of the lives and property of the citizens and inhabitants of the City of Newport."

Counsel can hardly contend that the resolution in question is not a complete exercise of the city's legislative power in view of the foregoing allegation of the answer that it is an exercise of the police powers of the city, and of the allegation in his amended answer that the city proposes to seek the "enforcement of said resolution" in the Campbell Circuit Court. If it is not an enactment by the city, it could not be enforced even by a suit in court.

The court below said (R. 17):

> "There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution."

The contract clause of the Constitution is directed against

> "every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority."
>
> *Ross* v. *Oregon*, 227 U. S. 150, 162.

It is not very important to determine whether the resolution in question is technically "a law of the state." The bill asserts that the action of the city amounts also to a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment.

If the governing body of the city adopts such a resolution, and, as alleged in the bill, the city proposes to enforce it by forceable removal of the wires, a case is made under the Fourteenth Amendment, whether the action be legislative or executive.

An arbitrary or unreasonable exercise of the police power may be enjoined by a court of equity as a violation of the Fourteenth Amendment (*Dobbins* v. *Los Angeles*, 195 U. S. 223); and the prohibition of that amendment refers to

> "all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'"
>
> *Chicago, Burlington, etc., R. R.* v. *Chicago*, 166 U. S. 226, 233.

Counsel for the city, in his brief, relies principally on two decisions by the District Court for the Northern District of Alabama, *American Telephone & Telegraph Co.* v. *Town of New Decatur*, 176 F. 133, and *Southern Bell Telephone & Telegraph Co.* v. *Birmingham*, 211 F. 709. Neither of these cases is in point in the case at bar.

In *American Telephone & Telegraph Co.* v. *Town of New Decatur*, 176 F. 133, it appeared that the town had adopted an ordinance repealing a prior telephone franchise and directing the removal of the poles and wires of the company erected thereunder. On the same day and about a week later, and before suit was brought in the Federal Court, the city adopted resolutions directing the attorneys for the city to institute legal proceedings to require the removal of the poles and wires, etc. The suit of the company in the Federal Court was, in effect, to enjoin the in-

stitution of such legal proceedings by the town. As the court said (141):

> "The passage of a resolution authorizing the institution of a suit to compel removal is inconsistent with a purpose to proceed under an earlier resolution to remove by force and without suit. The bill also avers, 'that, in pursuance of the ordinances and resolutions passed by the board of aldermen of the city of New Decatur, as hereinabove set forth, the said city authorities of the said city intend forthwith and without delay to take steps to force orator to remove its poles and wires from the public streets of said city.' The averment is that the removal was to be forced pursuant to the ordinances and resolutions set out in the bill; that is, by filing legal proceedings to compel their removal. No acts or threats of defendant are averred or relied on other than the ordinances and resolutions set out in the bill, as indicating a purpose on its part to resort to violence. Construing the resolutions and ordinances as an entirety, the only action reasonably to be expected to be taken by the town authorities was a suit in court. This case is, therefore, identical with the case of *Des Moines City Railway Co., supra;* and controlled by it. For the reasons stated, the court is without jurisdiction."

Of course the decision just quoted is not authority in this court and we will not attempt to analyze it at length, but limiting it to its facts, and considering the gist of the decision as just quoted, it is evident that it is not applicable to the case at bar.

In *Southern Bell Telephone & Telegraph Co.* v. *City of Birmingham*, 211 F. 709, the city passed an ordinance undertaking to repeal a prior ordinance fixing certain agreed rates for telephone service. The company contended that the second ordinance impaired the obligations of the

original contract. The court held that it did not, because the new ordinance did not undertake to fix any rates or to prevent the company from charging the rates named in the alleged contract. The court said (pp. 713-714):

> "The ordinance complained of in the bill in this case fixes no rate to be observed by the plaintiff. It merely declares void a contract which fixed rates. It leaves the plaintiff at liberty to fix its own rates, subject to liability only if they are unreasonable. It seeks to deprive the plaintiff of the protection of the agreement, but otherwise leaves it unhampered. The plaintiff can still put in force the increased rates. Its effect is therefore limited to repudiation of the contract and it comes within the line of cases which holds that a mere declaration of repudiation of a contract is not action impairing the obligation of a contract, rather than within the other line of cases, relied on by the plaintiff, in which the ordinances prescribed, in addition, action looking to the enforcement of the contract."

It is clear that this case is inapplicable to the case at bar. The opinions in the two cases—by the same judge—must be read with reference to the facts with which the court was dealing. The theme which runs through the two opinions is (176 F. 137):

> "The rule is well settled that an ordinance or resolution of a municipality, the effect of which is merely to deny liability upon or repudiate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding." (See also 211 F. 710.)

Without adopting this generalization, we claim that it supports, rather than opposes our position.

The resolution of the City of Newport does not "merely deny liability upon or repudiate a contract." It recites that the wire which the bill alleges was rightfully erected, has become "dangerous to life and property" and that its removal "is necessary to secure the safety of the lives and property of the citizens" and "directs" its removal, "in the exercise of the general police powers of the City of Newport." (Answer of city.)

Such a resolution certainly "creates antagonistic rights or duties," *i. e.*, antagonistic to the alleged contract, and this comes within the quoted definition of "impairing legislation."

It purports to create by its finding that the wire is a public nuisance, the "right" on the part of the city to require the removal of the wire, and by its order of removal the "duty" on the part of the company to remove it.

In the case last mentioned (211 F. 709), the court, in differentiating the case of *Iron Mountain Railroad Co.* v. *Memphis*, 98 F. 113, uses language which is equally applicable to the case at bar. The court says (p. 713):

> "In the case of *Iron Mountain R. R. Co.* v. *Memphis*, the ordinance declared the forfeiture of a franchise to occupy a street with railroad tracks, and, as the court held, authorized a re-entry of the city upon the premises in possession of the railroad. Its effect, if enforced, was to dispossess the railroad of property in its possession, and it was to prevent this enforcement and the consequent dispossession of the railroad, that it was held entitled to relief. In the case at bar the ordinance authorizes no interference or disturbance of the plaintiff or its property or franchise, but merely attempts to declare invalid a contract."

So in the case at bar the effect of the Newport resolution, if enforced, "was to dispossess the railroad of prop-

erty in its possession" and it is "to prevent this enforcement and the consequent dispossession of the railroad" that it is "entitled to relief."

In *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, which is the principal authority relied on in the two District Court decisions above referred to, the Light Company brought suit in the state court against the City of St. Paul to recover interest on the cost of certain lamps constructed and placed by the Light Company on the streets of St. Paul. Its claim was based on a section of its legislative charter. The city had denied its liability by ordinance. The trial court decided in favor of the company. It was reversed by the Supreme Court of the state, which decided in favor of the city.

This court held that the ordinance of the City of St. Paul denying its liability to pay interest under the charter was not legislation impairing the contract; that the ordinance did not in any way affect the contract right of the plaintiff to recover such interest and had no greater effect thereon than an answer filed by the city in the case; that therefore there was no constitutional question involved and that this court had no jurisdiction over the writ of error from the Supreme Court of the State of Minnesota. This court said on page 149:

> "The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payments."

In *Northern Pacific Railway Co.* v. *Duluth*, 208 U. S. 583, the *St. Paul case* was discussed and distinguished. In the *Duluth case* the Railroad Company had constructed a viaduct over Lake Avenue in Duluth under a contract whereby the city undertook for a period of fifteen years to maintain that part of the bridge over the railroad's right of way and to perpetually maintain the approaches, the Railroad Company having paid the greater part of the cost of construction.

Before the expiration of the fifteen years the City of Duluth passed a resolution requiring the Railroad Company to make certain repairs to the viaduct. An action was brought by the city in the state court to enforce the resolution and require the company to make the repairs. The company set up its contract and claimed that the resolution was an impairment and in violation of the Federal Constitution. The state court held that the resolution was a proper exercise of the police power of the city and ordered the company to make the repairs. The Supreme Court of the state affirmed the judgment. The case was taken on error to this court and the city denied the jurisdiction of this court on the ground that the resolution complained of was not a resolution impairing the obligations of the contract. This court, however, held that it had jurisdiction, saying on page 591:

> "We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their

benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

Also, on the same page:

"But recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits. For the judgment of mandamus against the railroad company could not have been rendered in this case without the prior legislation by the city ascertaining the necessity for repairs upon the viaduct, the character and extent of the same, and imposing upon the railroad company the duty to enter upon the street and construct the improvement.

This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming for jurisdictional purposes that the company had a valid claim of contract, it was impaired by the legislation of the city in question, we therefore think there is jurisdiction in the case."

Applying this language to the case at bar, if the appellants had the contract right to erect and maintain the wire as alleged in the bill, it required legislative action by the City of Newport to find and determine that the wire was a danger to the safety of persons and property in the City of Newport and to order its removal. Such was the purpose of the resolution involved in this case. The resolution itself would be the necessary foundation either for forceable removal by the city officials, or for a suit in court to order the removal of the wire.

If, as alleged in the bill, such attempted exercise of the police power of the city was unreasonable, arbitrary and unwarranted in fact, then the resolution itself is an impairment of the contract and a taking of property without due process of law.

The question of the character of the resolution in this respect is the same whether the jurisdiction of the District Court, or the jurisdiction of this court on error to a state court, is involved.

Reference is also made in the quotations in the brief for the city to *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. That case involved only the refusal of the City of Dawson to pay for water under a contract with the Water Works Company. It was held by this court to involve the same question decided in *St. Paul Gas Light Co.* v. *St. Paul, supra.*

The case of *Des Moines* v. *Des Moines Street Railway Co.*, 214 U. S. 179, is discussed in our main brief. An additional comment on that case is suggested by a consideration of the cases above referred to.

In the *Des Moines case* the resolution did not purport to terminate the contract rights of the Railway Company. It merely recited a controversy as to such contract rights and directed the City Solicitor to bring an action to en-

force the city's position with reference to such contracts. The city did not claim that the resolution in question terminated the rights of the Street Railway Co. It merely sought to obtain an adjudication in court of the rights of the city prior to the passage of the resolution.

The resolution in that case, so far as it directed the company to remove the tracks, was analogous to a notice to a lessee under an expired lease. Such notice would not create the lessor's right to repossession, it would merely put the lessor in a position to bring suit and in such a suit he would not be enforcing the notice but would be enforcing the rights which he has claimed in the notice.

In the case at bar, however, the right of the city, if any, to have the wire removed must be based on the resolution, which, as a claimed exercise of the city's police power, declares the wire dangerous and orders its removal.

We desire to call attention to certain decisions not referred to in our original brief.

In *North American Storage Co.* v. *Chicago*, 211 U. S. 306, 314, the court said:

> "The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the Fourteenth Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits."

See also *Pacific Ry. Co.* v. *Los Angeles*, 194 U. S. 112, 117-118.

In *City of Mitchell* v. *Dakota Central Telephone Co.*, 246 U. S. 396, the court upheld the jurisdiction of the District Court to enjoin, at the instance of the Telephone Company, the enforcement of a resolution of the City of Mitchell directing the company to remove its poles, wires, etc., from the streets. The order of removal in the resolution (p. 413) is not materially different from that involved in the case at bar, and the case seems to be decisive of this case.

Speaking of the jurisdiction the court said (406):

> "The first proposition needs but little comment. The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances and hence invoked against the city the contract clause of the Constitution of the United States and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions.

In *Cincinnati* v. *Cincinnati & Hamilton Traction Co. et al.*, 245 U. S. 446, the ordinance complained of recited the termination of the rights of the traction companies and set forth the terms upon which alone they could continue a day to day operation, providing expressly that in case the companies affected should fail to comply with the terms of the ordinance the City Solicitor was to take the necessary legal proceedings to enforce the ordinance. The answer of the city promptly denied any intention to interfere with or prevent the operation of the companies and alleged that enforcement of the ordinance would be sought only by an order of court.

This court upheld the jurisdiction of the court below but modified the judgment of the court below so as to limit

the city to enforcement of the ordinance by proceedings in court.

We submit that the remedy to be granted in this case should not be so limited because there is in the case at bar no such instruction in the ordinance to the City Solicitor to enforce the resolution by proceedings in court. Here there is an unqualified denunciation of the wire as a public danger and the peremptory direction to remove it, coupled with the sworn allegation of the bill that the city would, unless enjoined, remove the wire by force. The jurisdiction of the District Court was thus invoked for a complete adjudication of plaintiffs' rights, and if those rights were found to be as plaintiffs claimed, an injunction against any form of interference therewith.

All of which is respectfully submitted,

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Attorneys for Appellants.

Amendment; and prayed that the resolution be declared null and the city, its officers, etc., be enjoined from enforcing it, *Held:*

(1) That the bill set up a substantial federal question and conferred jurisdiction on the District Court. P. 99. *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, distinguished.

(2) That the jurisdiction, having attached, could not be defeated by an answer denying the city's intention to enforce the resolution except through an order of court. P. 100.

Reversed.

APPEAL from a decree of the District Court dismissing for want of jurisdiction a bill to restrain the defendant city from forcible removal and destruction of an electric wire.

Mr. Alfred C. Cassatt, with whom *Mr. Richard P. Ernst*, *Mr. Frank W. Cottle* and *Mr. Matt Herold* were on the briefs, for appellants.

Mr. Brent Spence for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

In their original bill appellants allege: That they hold perpetual franchises over certain streets in Newport, Kentucky, for operating street cars and distributing electric current; that in due course it became necessary for them to obtain an additional current from another company; and that to that end in 1915, under supervision and direction of the city authorities, they constructed a high tension wire extending from Central Bridge to their power house. That on November 20, 1917, the Board of Commissioners of Newport adopted a resolution which declared this current dangerous to life and property, and directed removal of the wire not later than December 1, 1917.

The bill further alleges that " unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street rail-

way system and the electric lighting and power system above described, causing plaintiffs injury which cannot be compensated in money and to their irreparable damage," and that "it is not true that said wire is dangerous to either life or property and that said resolution is unreasonable and in violation of the rights of plaintiffs as hereinabove set forth; that it is an impairment of the obligations of the aforesaid contracts and each of them, in violation of Article I, Section 10 of the Constitution of the United States and is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment to said Constitution of the United States."

The relief prayed is that the resolution be declared null and that the City, its officers, agents and employees be enjoined from enforcing or attempting to enforce the same.

Relying upon *Des Moines* v. *Des Moines City Ry. Co.*, 214 U. S. 179, the court below dismissed the bill for want of jurisdiction. The cause comes here by direct appeal, and only the question of jurisdiction is before us.

Where, as here, the jurisdiction of a District Court has been invoked on the sole ground that the cause involves a federal question, and this is duly challenged, the issue must be determined by considering the allegations of the bill. If they distinctly disclose a real, substantial question of that nature, there is jurisdiction; otherwise there is none. *City Ry. Co.* v. *Citizens' Street R. R. Co.*, 166 U. S. 557, 562; *Pacific Electric Ry. Co.* v. *Los Angeles*, 194 U. S. 112, 118; *Columbus Ry., Power & Light Co.* v. *Columbus*, 249 U. S. 399, 406.

A mere formal statement that such question exists does not suffice. The allegations must show that "the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the Constitution, or some law, or treaty of the United States." *American Sugar Refining*

Co. v. *New Orleans*, 181 U. S. 277, 281; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147.

Properly understood, *Des Moines* v. *Des Moines City Ry. Co., supra*, is in harmony with these well-established principles. There the bill disclosed that the only affirmative action contemplated by the City was the institution of an orderly proceeding in court. Such action could not in any proper sense violate a right under the Constitution, laws or treaties of the United States. The bill did not, therefore, present a substantial federal question, and for that reason jurisdiction did not exist.

Here it is affirmatively alleged that the City intends forcibly to remove and destroy appellants' property and thereby violate their constitutional rights. This presented a substantial claim under the Constitution.

In an amended answer defendant denied intention to enforce the resolution except through an order of court. But the necessary facts having been alleged by the bill, jurisdiction could not be thus defeated. The denial went to the merits of the claim. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *St. Paul, M. & M. Ry. Co.* v. *St. Paul N. P. R. R. Co.*, 68 Fed. 2, 10.

The judgment below must be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE PITNEY concurs in the result.

MR. JUSTICE BRANDEIS and MR. JUSTICE CLARKE dissent.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY COMPANY, ET AL. *v.* CITY OF NEWPORT, KENTUCKY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

No. 203. Argued April 13, 1922.—Decided May 15, 1922.

The bill alleged that the plaintiffs were corporations operating electric street cars and distributing electric current under perpetual franchises in the city; that under supervision and direction of the city authorities they constructed a high tension wire to obtain necessary additional current from another company; that afterwards the city council by resolution directed speedy removal of the wire, declaring it dangerous to life and property, contrary to the fact, and that, unless restrained, the city would forcibly remove and destroy it, thereby interfering with the operation of plaintiffs' railway, lighting and power systems, and causing them irreparable damage, in violation of their rights under the Contract Clause of the Constitution and the due process clause of the Fourteenth